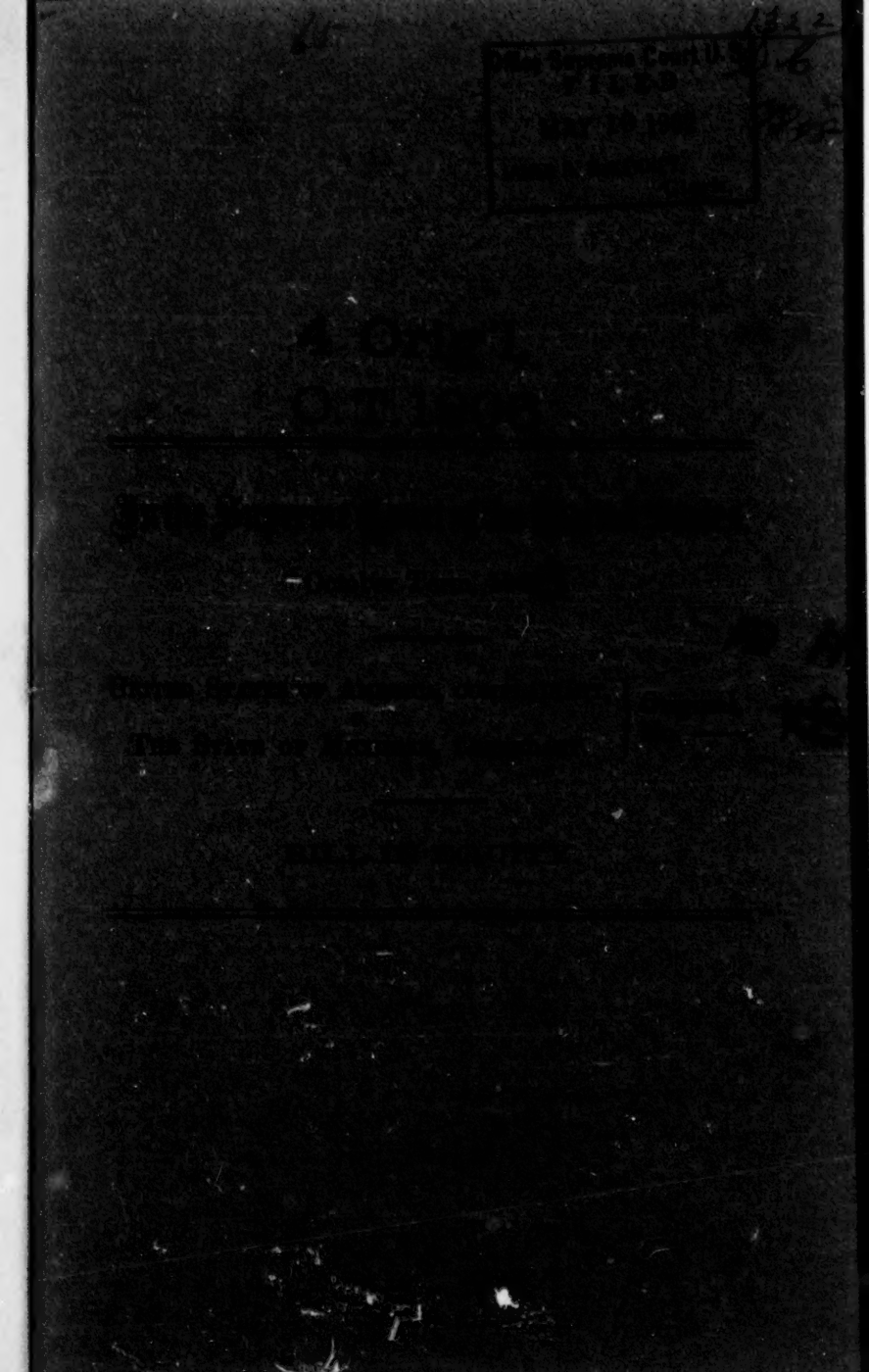


In the Supreme Court of the United States.

IN EQUITY. ORIGINAL, No. ——.

October Term, 1901.

To the Chief Justice and the Associate Justices of the Supreme Court of the United States, in Equity:

Philander C. Knox, Attorney-General of the United States of America, for and in behalf of said United States, brings this bill of complaint against the State of Michigan, and thereupon your orator complains and says:

FIRST.

That the said State of Michigan, for some years previous to the date first hereinafter mentioned, was desirous of procuring the construction of a canal and lock in the St. Marys River, at or near St. Marys Falls, where Lake Superior empties into said river; and did at various times, by joint resolutions of the legislature thereof, importune the Congress of the United States to construct such a canal and lock on the Michigan side of said river, and was able through the influence of its Senators and Representatives in Congress from said State, with the cooperation and influence of other States which might become directly affected in a desirable manner, to cause and procure said Congress to

pass a law, which became operative on the 26th day of August, 1852, appropriating to the State of Michigan 750,000 acres of land, to be afterwards selected, to construct such ship canal and lock. Said act is in terms as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there be, and is hereby, granted to said State the right of locating a canal through the public lands known as the military reservation at the Falls at St. Marys River in said State, and that four hundred feet of land in width extending along the line of such canal be, and the same is hereby, granted, to be used by said State, or under the authority thereof, for the construction and convenience of such canal, and the appurtenances thereto and the use thereof is hereby vested in said State forever for the purposes aforesaid and no other: *Provided*, That in locating the line of said canal through said military reservation the same shall be located on the line of the survey heretofore made for that purpose, or such other route between the waters above and below said Falls as, under the approval of the Secretary of War, may be selected: *And provided further*, That said canal shall be at least one hundred feet wide, with a depth of water twelve feet, and the locks shall be at least two hundred and fifty feet long and sixty feet wide.
>
> SEC. 2. *And be it further enacted*, That there be, and hereby is, granted to the said State of Michigan, for the purpose of aiding said State in

constructing and completing said canal, seven hundred and fifty thousand acres of public lands, to be selected in subdivisions, agreeably to the United States surveys, by an agent or agents to be appointed by the governor of said State, subject to the approval of the Secretary of the Interior, from any land within said State subject to private entry.

SEC. 3. *And be it further enacted*, That the said lands hereby granted shall be subject to the disposal of the legislature of said State for the purposes aforesaid and no other; and the said canal shall be and remain a public highway for the use of the Government of the United States, free from toll or other charge upon the vessels of said Government engaged in the public service, or upon vessels employed by said Government in the transportation of any property or troops of the United States.

SEC. 4. *And be it further enacted*, That if the said canal shall not be commenced within three and completed within ten years, the said State of Michigan shall be bound to pay to the United States the amount which may be received upon the sale of any part of said lands by said State, not less than one dollar and twenty-five cents per acre, the title to the purchasers under said State remaining valid.

SEC. 5. *And be it further enacted*, That the legislature of said State shall cause to be kept an accurate account of the sales and net proceeds of the lands hereby granted and of all expenditures in the construction, repairs, and operating of said canal and of the earnings

thereof, and shall return a statement of the same annually to the Secretary of the Interior; and whenever said State shall be fully reimbursed for all advances made for the construction, repairs, and operating of said canal, with legal interest on all advances, until the reimbursement of the same, or upon payment by the United States of any balance of such advances over such receipts from said lands and canal, with such interest, the said State shall be allowed to tax for the use of said canal only such tolls as shall be sufficient to pay all necessary expenses for the care, charge, and repairs of the same.

SEC. 6. *And be it further enacted*, That before it shall be competent for said State to dispose of any of the lands to be selected as aforesaid, the route of said canal shall be established as aforesaid, and a plat or plats thereof shall be filed in the office of the War Department, and a duplicate thereof in the office of the Commissioner of the General Land Office.

Approved, August 26, 1852.

And your orator further shows that the legislature of the State of Michigan afterwards passed an act providing for the construction of a ship canal around the Falls of St. Mary, the same being number thirty-eight of the session laws of the State of Michigan for the year 1853. By this act the appropriation of land made by Congress as aforesaid was accepted, with all conditions therein expressed attached, and made obligatory upon the State of Michigan. By its said act, also, the governor was authorized to appoint a board

of five commissioners and an engineer for the purpose of looking after the construction of said canal and lock; provisions were made relative to the contract proposed to be entered into for the construction of the canal; the expenses of surveying, locating, and constructing the same; the manner in which the expenses attendant upon such construction should be paid, which was substantially out of the lands so appropriated by Congress; the keeping of accounts connected with such construction; the turning out of lands to the contractor and subcontractor, and other matters connected with such work, such act being in terms as follows:

SECTION 1. *The people of the State of Michigan enact*, That the act of Congress entitled "An act granting to the State of Michigan the right of way and a donation of public land for the construction of a ship canal around the Falls of St. Mary, in said State," approved August 26, 1852, is hereby accepted, and all conditions expressed in said act are hereby agreed to and made obligatory upon the State of Michigan.

SEC. 2. For the purpose of carrying out the objects of said act the governor is hereby authorized, by and with the advice and consent of the senate, to appoint five commissioners and an engineer, who shall prepare a plan for the construction of said canal in conformity with the provisions of said act of Congress and this act, to be approved by the governor, and who shall have the entire and absolute control and supervision of the construction of said canal; and said commissioners are authorized and empowered to make all necessary contracts for the

construction of the same; and during said construction, if at any time said commissioners shall be dissatisfied with the manner of construction or the materials used, it shall be competent for them, or a majority of them, to direct the contractor to construct the same in such other manner and to use such other materials as to such commissioners, or a majority of them, or engineer, shall seem necessary to insure a permanent and durable work; and this condition shall be embodied in any contract made for the construction of said canal. In case any controversy shall arise between the commissioners and contractor or contractors in regard to said materials, or the manner of doing said work, during the construction of said canal, the same shall be decided by a board, to consist of said engineer and the governor of this State, and the district judge of the upper peninsula, who shall decide thereon in a summary manner, and the decision of a majority of them shall be binding and conclusive upon the contractors, who shall thereupon proceed with the work, in the manner and make use therein of the material so required by said board or a majority of them: *Provided, however*, That the work upon said canal shall not be suspended or delayed by reason of said controversy, and the contractors shall proceed therewith as required by said commissioners. The locks in said canal shall not be less than three hundred and fifty feet long, and not less than seventy feet wide: *Provided*, That all appointments made by virtue of this act shall

cease and determine when said canal is completed.

SEC. 3. The said commissioners shall receive proposals for the construction of said canal, agreeable to said plan, and, in deciding upon said proposals, are required to take into consideration the responsibility of the person or persons offering to contract for the same, and his or their ability to carry into effect the object and intention of said act of Congress, by constructing said canal in the best and most expeditious manner; and said commissioners, in making said contract, shall require good and ample security for the performance thereof. Neither the commissioners, or governor, or the engineer, or any member of this legislature, or any person related to the commissioners or engineer, shall in any manner be interested in the contract, directly or indirectly, for the construction of said canal.

SEC. 4. No contract for the construction of said canal shall take effect until it shall have been approved by the governor and engineer.

SEC. 5. The contractor or contractors for the construction of said canal shall defray the entire cost of surveying, locating, and constructing the same, the necessary traveling and other expenses of the commissioners, the salary of the engineer and assistants. The necessary expenses of the commissioners shall be paid out of the State treasury, upon the warrant of the auditor-general. The engineer shall have power, with the approval of said commissioners, to employ such assistants as may be necessary and

proper. The assistants shall receive such reasonable compensation for their services as may be agreed upon by said commissioners, and the engineer and assistants shall be paid out of the State treasury from time to time, upon the account of each respectively being certified to be correct by said commissioners and upon the warrant of the auditor-general. The cost of locating the said canal, and all expenses of every kind incidental to the supervision of the construction and completion of said canal, shall be reimbursed by the contractors as fast as ascertained, and shall be paid by them into the State treasury and under the direction of said commissioners. When, and as fast as the lands shall have been selected and located, an accurate description thereof, certified by the persons appointed to select the same, shall be filed in the office of the commissioner of the State land office, whose duty it shall be to transmit to the Commissioner of the General Land Office a true copy of said list and to designate and mark upon the books and plats in his office the said lands as St. Mary canal lands.

Sec. 6. The commissioners shall require said canal to be constructed and completed within two years from making the contract; and on the completion of the same within said period to their satisfaction and acceptance and the satisfaction of the governor and engineer, they shall cause a certificate thereof to be signed by the commissioners, governor, and engineer, and filed in the office of the commissioner of the State land office. Thereupon it shall be the

duty of the said commissioner of the State land office forthwith to make certificates of purchase for so much of said lands as by the terms of the contract for the construction of said canal are to be conveyed for the purpose of defraying its costs and the expenses hereinbefore provided, which certificates shall run to such persons and for such portions of said lands so selected and to be conveyed as the contractor may designate, and shall forthwith be delivered to the secretary of state, and patents shall immediately be issued thereon, as in other cases.

SEC. 7. That said commissioners shall keep an accurate account of the sales and net proceeds of the lands granted by said act of Congress, and of all expenditures in the construction of said canal, and the earnings thereof, and, on or before the first Monday in October in each year, return a statement thereof to the governor, whose duty it shall be to return the same, or a copy thereof, to the Secretary of the Interior, at Washington, as required by said act of Congress.

SEC. 8. The said commissioners shall be subject to removal for cause by the governor; and if a vacancy shall occur, by removal or otherwise, when the legislature is not in session, the governor may fill such vacancy, and the person so appointed shall hold his office until the legislature meet.

SEC. 9. For the selection of the lands granted by Congress, as aforesaid, for the construction of said canal, the governor shall appoint agents, in pursuance of said act. He shall give notice

to the person or persons contracting under this act to construct said canal, to recommend to him suitable persons to make such selections; and he shall appoint such agents from the persons so recommended, if, in his judgment, suitable and proper persons for that purpose.

SEC. 10. That such contractor is by this act empowered and authorized to associate with himself in the obligations, agreements, and conditions of said contract such persons or parties as he may elect, and assign to them such proportional interest in the remunerations of lands, or the avails thereof, as he may decide and agree upon; or he may assign his rights, privileges, and remunerations under the contract with the State to any association organized according to the laws of this or any other State; and, upon due notice to the board of commissioners and governor, they shall be made parties to the obligations and emoluments of the contract, and be authorized upon such assignment and notice to hold and sell lands, and improve and use the same as they may see fit and desirable, to the same extent that the contractor might individually have done; but in no case shall himself or his sureties be eased or exempted from their full liabilities to forfeitures for nonfulfillment of the contract as before specified in failure or inadequacy of additional security offered by assignees: *Provided*, It shall not be lawful for said company to use their funds, or any part thereof, in any banking or brokerage or in buying or selling bank notes or bills of exchange, or in any other business whatever, except that

especially provided for by this act and the acts referred to herein.

SEC. 11. The said commissioners, in entering into the contract for the construction of said canal, shall provide that the railroad at present existing across the Portage be in no way unnecessarily interrupted during the progress of the work; and said commissioners shall have power to decide the necessity of any interruption; and the said commissioners may, at the expense of the said railroad company, relocate said railroad, if they shall deem it necessary to aid and promote the construction of said canal.

This act shall take effect immediately.

Approved, February 5, 1853.

SECOND.

Your orator shows that the lands so appropriated were duly selected and certified to the State of Michigan, and that he is informed and verily believes, and so charges the fact to be, that the lands so appropriated were all sold and disposed of in some manner by the State of Michigan, and that at some time subsequent to such selection and certification said State of Michigan constructed, or caused to be constructed, and put into operation the canal and lock so appropriated for, but that the said State of Michigan did not report to the Secretary of the Interior, as required by the terms of section 5 of said act of Congress, an accurate account of the sales and net proceeds of the lands granted and of all expenditures in the construction, repairs, and operating of said canal, and of the earnings thereof; but, on the contrary, your orator shows

that after diligent search and inquiry in the office of the Secretary of the Interior, to whom such annual reports should have been made, no such reports can be found on file, and no record or memoranda indicating that any report or reports, such as were provided for in said section, were ever made, so that your orator is unable to state in what manner said lands were sold or disposed of, or whether all the proceeds thereof were in fact devoted to the construction, control, and management of said canal, as in said act provided.

THIRD.

Your orator further shows that by an act of the legislature of the State of Michigan, approved February 12, 1855, a superintendent was authorized to be appointed by the governor of the State of Michigan, with the advice and consent of the senate thereof, his salary fixed, and the manner of keeping record of the vessels navigating said canal and passing through said lock, as well as the tolls to be collected and the keeping of accounts, were all provided for; that from the completion of said canal and lock the same were controlled, operated, and managed by the State of Michigan, and that during the entire management of the same by said State, as your orator is informed and verily believes and therefore charges the fact to be, no funds belonging to the State of Michigan were ever permanently invested or involved in such control, operation, and management, but, on the contrary, said canal was wholly constructed from the appropriation of such lands so made by the United States aforesaid, and was

managed, controlled, repaired, and maintained from the amounts collected as tolls from the vessels passing through said canal and lock during the several years when said State of Michigan was in such control thereof.

FOURTH.

And your orator further shows that he is informed and verily believes, and therefore charges the fact to be, that during such management and control by the State of Michigan there were from time to time moneys collected in the form of tolls in excess of the amounts actually used at the period of such collection, and that this was done without intention on the part of the State of Michigan to make a profit from the management and control of said canal in violation of the act of Congress hereinbefore quoted, but for the purpose of having cash on hand to make repairs either during the season when the canal was closed to navigation or any time when so needed, and that said fund gradually increased in amount with the increasing volume of commerce through the canal until finally, at the time when the canal was turned over to the United States, there was in the treasury of the State of Michigan belonging to the fund of said canal, not appropriated or the expenditure thereof in any way provided for, the acknowledged sum of $68,927.12, all of which had been paid for or collected in the manner hereinbefore stated for the purposes hereinbefore mentioned, and in direct compliance with the requirements of the act of Congress originally providing for the construction of

said canal; and that said money had been collected in good faith and for the purposes of devoting the same ultimately to the repair, improvement, supervision, and expenses of the management thereof.

And your orator further shows that there was purchased and collected from time to time a large quantity of tools, implements, and property of various kinds in connection with extensions, repairs, improvements, management, and control of said canal and lock by defendant, and at the time of the transfer to the United States as aforesaid the same were on hand and within the control and in the custody of the defendant, all of which properly belonged and appertained to the said canal and lock and to the defendant in its capacity as the manager and controller thereof, but whether any further and larger sum of money than is hereinbefore stated was, should, or might have been on hand and within the control of said defendant, in its treasury or otherwise, or might or should have been accredited to the account of the said canal and lock, your orator does not know and has no means of being informed, and is therefore obliged to depend upon an accounting by the defendant, hereinafter to be prayed for, for correct and authentic information.

FIFTH.

And your orator further shows that the State of Michigan had no beneficial interest in said canal or lock, except as it affected the general public welfare, and had expended, or claimed to have expended, all the appropriation of Congress for the construction of

the same, and that the increasing demands of commerce required great expenditures of money for the enlargement and betterment of said canal and lock, together with the probable construction of a new and enlarged lock, and that it was not convenient, if possible, to provide the funds therefor by the collection of tolls upon the vessels passing and repassing through said canal; that the State of Michigan not alone being interested in such enlargement and improvement, but rather the general public, and particularly the inhabitants of several rapidly growing States of the Union, it was proposed to transfer the canal to the United States to accomplish such end, and for that purpose an act was passed by the legislature of the State of Michigan and became operative on March 3, 1881. By the terms of said act the board of control of said canal, constituted by defendant for its management, was authorized and empowered, at any time when they might deem it proper, to transfer all material belonging to said canal and to pay over to the United States all moneys remaining in the canal fund, excepting so much as might be necessary to put the canal in repair for its acceptance in accordance with the act transferring the same to the United States; and the Congress of the United States in turn passed an act authorizing the Secretary of War to accept on behalf of the United States from the State of Michigan the said canal and the public works thereon, and appropriating $250,000 to improve and operate the same, the same being the act approved June 14, 1880, found in the 21st Stat. L., 189. And

thereupon said canal actually was transferred to the officers of the Government of the United States connected with the War Department thereof, and your orator shows, avers, and charges that no tools, implements, personal property, chattels, goods, moneys, or effects of any name or nature that were in the treasury of the State of Michigan, or should or might have been therein at the time of such transfer, or within the custody of said State of Michigan, defendant herein, or might have been in such custody connected with or belonging to said canal or lock, its fund, its management and control, were so transferred and turned over.

SIXTH.

Your orator further shows that, while certain of the terms of the act of Congress appropriating the land for the construction of said lock and canal indicated a donation to the State of Michigan for such purpose, it was really the intent and purpose of the Congress of the United States to appropriate such lands, not for the purposes of exclusively enriching the Stateof Michigan, increasing its commerce, or extending its authority alone, but for the purpose of accomplishinga public work for the general good of all classes of people engaged or interested in the commerce of the Great Lakes of the United States, and for that reason, while granting said lands to the State of Michigan in certain of its terms, it was provided that in case of the failure to construct said canal, the proceeds of the sale of such lands should be returned to the United States; also that the State of Michigan should have no beneficial interest

in the revenue from said canal, when constructed, while in its management and control, but that the said canal and lock should be actually free to the United States Government, and for the use of all persons desiring the same, except as to the necessary tolls to pay for their supervision, repairs, and maintenance; and it was also provided that a strict account should be kept of the sales of said lands, and that they should be applied to the construction of said canal and lock and to no other purpose whatever; also that annual reports should be made by the State of Michigan and forwarded by the governor thereof to the Secretary of the Interior concerning the management, control, and sale of lands; and thus, instead of being an actual grant or donation of lands to the State of Michigan for its individual benefit, and to become a part of its domain and to be within its ownership, the terms of said act merely operated to create a trust in the State of Michigan for the purpose of carrying out a public work in which it, the State of Michigan, had become interested for the general public good. Your orator further shows that by the act of the legislature of the State of Michigan hereinbefore quoted said donation or appropriation of lands was accepted subject to all limitations, restrictions, and conditions imposed by Congress as aforesaid. Your orator further shows that the State of Michigan, at the time and continuously until a very recent period, hereinafter to be mentioned and set forth, not only regarded its sale of said lands, its construction of said works, and its management and control of the latter as

a trust for the public good from the complainant, but also through its legislature, as well as various of its officers, so declared; and that in an act of the legislature of the State of Michigan passed and approved February 14, 1859, the same being No. 175 of the session laws of the State of Michigan for said year, and particularly in the third paragraph of the preamble thereof, said legislature made use of the following language:

> Whereas such canal, having been built and accepted by the authorities of this State, is found to need repairs in order to its preservation and usefulness, and the due performance of the trust created by said act of Congress, and the assent of this State thereto, etc.

And your orator further shows that the treasurer of the State of Michigan, who, by virtue of his office, was one of the members of the said board of control of the St. Marys Falls Ship Canal, in his annual report for the year 1883, duly made to the governor and transmitted to the legislature of said State, made use of the following language:

> Since my last report, the remainder of the personal property belonging to the St. Marys Falls Ship Canal has been sold, making a final balance in that fund of $68,927.12. All business pertaining to the management of the canal on the part of the State has ceased and the moneys in the fund remain in the State treasury under act No. 17, laws 1881, the State acting simply as trustee.

But your orator shows that of late said defendant, through its officers and servants, and particularly its attorney-general and the board of control of St. Marys Falls Ship Canal, denies such a trust, or its liability to the United States in the premises.

SEVENTH.

Your orator further shows and charges that it became and was the duty of the State of Michigan to transfer and pay over to the United States all funds appertaining to or connected with or collected for the repairs and management of said canal to the complainant, and to transfer to the complainant all property of every name and nature within its custody and control in connection with said canal and lock, and that instead of so performing its equitable duty in the premises, the said State of Michigan, the defendant herein, converted said funds to its own use, by passing a joint resolution transferring the same from the canal fund to the general fund in the treasury of said State, said joint resolution being No. 20, of the public acts of 1897, which in terms is as follows:

> Whereas there has remained to the credit of the St. Marys Ship Canal fund a credit balance which was on hand at the time of the transfer of the said canal from the State to the United States, and no claim has been made for any part of such moneys, either by any persons who paid the same into the fund or by the General Government;
>
> And whereas there now remains on hand, under the board of control of the St. Marys

Ship Canal, an invoice of tools and machinery, and no demand by any person or persons or by the United States having been made for a transfer of said tools and machinery:

Therefore, resolved by the senate and house of representatives of the State of Michigan, That the auditor-general be, and he is hereby, directed to transfer such balance as shown upon the books of his office to the same, and it shall hereafter become a part of the general fund of the State.

And be it further resolved, That the board of control of the St. Marys Ship Canal be, and they are hereby, authorized to dispose of, at the best possible advantage, the tools and machinery aforesaid and now under their control, and deposit the money received from the sale of said property in the general fund of this State.

Your orator further shows that a due and proper request to account to the United States in the premises, and to pay over all funds and turn over all property in its hands to the United States, has been made by your orator of the governor of the State of Michigan and all of the officers of said State directly concerned in any manner with the custody, management, or control of said fund or property, and particularly of the board of control of the St. Marys Ship Canal, which consists of the governor, auditor-general, and treasurer of the said State of Michigan; and also of the attorney-general of the State of Michigan, and that said reasonable and just request has been refused by them and each of them.

EIGHTH.

Your orator also shows and charges that it became and was the duty of the State of Michigan to report its doings in the premises to the Secretary of the Interior at least once in each year from the date it assumed the trust hereinbefore set forth, and to account to said complainant for all of its doings in regard to the sale of the lands so appropriated as before stated, as well as the building and construction of said canal and the collection of tolls and expenditures of money in connection with the care, supervision, management, and repair of said canal and lock, and the funds in its hands from time to time; and that it became and was its duty in equity to pay over all funds on hand or within its control in connection with its said trust, and to surrender and transfer to the complainant all property, goods, implements, and effects in its hands connected therewith at the time when the said canal was transferred and passed into the hands of the United States, and for want of performance of its just, reasonable, and equitable duties in such behalf and its failure to perform its said duties, the State of Michigan, trustee, and defendant in this suit, should be held to make just, true, certain, specific, and complete account of all its doings in and about the sale of the said lands so appropriated, the moneys, if any, received therefrom, the manner and extent to which the same were expended and for what purpose, and the balance, if any, arising from the disposition of said lands which remained, or still remain, or should be and remain within the treasury of

the said defendant; and also to fully account for its construction of the said canal and lock and the manner in which the same was performed, and the time when said work was fully completed; and also to account for all tolls collected from year to year in, by, under, and through its management and control of the said canal and lock, from the time when the same were put into operation to the present time, and also the collection of tolls from time to time and from year to year, and what was done with the said tolls, and by whom and for what purpose the same were expended, and also as to what tools or implements or property of any name and nature were from time to time purchased, used, held, and kept by said defendant under its control and management of the work aforesaid, and also what balance of money and what property were in its hands at the time of transfer of said canal to the complainant as hereinbefore stated, and what disposition has been made of the same.

Your orator therefore prays that the said defendant may set forth an account of all and singular the lands so appropriated by Congress and certified to defendant as aforesaid, and set forth and in detail show in what manner the same were disposed of and for what purpose, and particularly any portion of the proceeds arising from such sale or disposition of said lands so used by said defendant for any purpose whatever other than in the construction of said canal and lock, and the proper expenses connected therewith; and if so, what lands were so otherwise made use of, or the

proceeds thereof diverted by the said defendant, and the price and value of the same;

And also that the defendant may set forth a full, true, and just account of the moneys arising from the sale and disposition of said lands that were paid out and expended in and about the construction of the said canal and lock; to whom the same were paid, and in what manner and to what extent;

And also that the defendant may set forth a full, accurate, just, and true account and report of the manner in which said canal and lock were constructed, and the time or times at which said work, or portions thereof, was done and completed, and when the whole of the same was completed and put into operation;

And also that the said defendant may set forth and show, year by year, the rate fixed for tolls levied upon vessels for the use of said canal and lock, as well as the number of vessels using the same, their accurate tonnage, and the amount of money collected from them, and when and how and for what purpose the same was expended by the said defendant, and how much, if any, remained on hand at the close of each year's collection of tolls, and care, supervision, and maintenance of said canal and lock;

And that the said defendant may also set forth, year by year, an account of what tools, implements, machinery, or other property so purchased for use in the care, control, repair, and improvement of said canal, and what portion of the same remained on hand and undisposed of at the end of each year of such control

and management, and whether any of said property was sold or disposed of from time to time and sums of money received therefor, and for what purpose such sums of money were used;

And also that the said defendant may fully set forth an account, by list or schedule, of all and singular the tools, implements, machinery, or items of personal property of every name and nature belonging or in anywise appertaining to said canal and lock, with the inventoried value thereof in detail, in the possession or control of said defendant at the time said canal was transferred as aforesaid by the defendant to the United States;

And also that the said defendant may discover and set forth a full, true, and particular account of the money on hand and within the control of the board of control of said canal and lock, or any of the officers, employees, or agents of said defendant connected with the control and management of said canal and lock, or within the treasury of the said defendant, belonging to, connected with, or accredited to the said canal and its fund at the time of the said transfer by defendant to the United States;

And your orator further prays that after such accounting so prayed for as aforesaid, to be had under the direction and according to the rules of practice of this honorable court, the defendant may also, by the proper decree thereof, be required to turn over to the United States, through some proper officer thereof to be designated, all and singular the implements, tools,

machinery, and personal property of every name and nature which may remain in its hands; and if it shall be discovered upon such accounting that any part, parcel, or portion of said property has been disposed of by the said defendant since the transfer of the said canal and lock to the United States by the said defendant, that said defendant may be decreed to pay to the United States the full value of such property, together with interest thereon from the time or times when the same was so disposed of;

And also that said defendant, after such accounting to be had as aforesaid, may be decreed by this honorable court to pay over to the United States, through its proper officer to be designated by the court, all moneys which were or should have been on hand in its treasury or in the custody of any of its officers, employees, or agents connected with the building, repair, management, and control of said canal and lock until the time of such transfer, together with reasonable interest thereon, to be computed from time to time at such rate as this honorable court may by its order determine, and that your orator may have such other and further relief in the premises as shall be agreeable to equity and good conscience, and as may be found to be just and proper.

May it please your honors to grant unto your orator the writ of subpœna, issuing out of and under the seal of this honorable court, to be directed to the said State of Michigan, commanding it by a certain day and under a certain penalty therein to be inserted, to be

and appear before this honorable court in equity, and then and there to answer the premises, and further to stand to and abide such order and decree therein as shall be agreeable to equity and good conscience.

And your orator will ever pray, etc.

P. C. KNOX,
Attorney-General of the United States.
JOHN K. RICHARDS,
Solicitor-General.
MARSDEN C. BURCH,
Solicitor, and of Counsel.

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Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

4 Orig'l.
O.T.1906

In the Supreme Court of the United States.

OCTOBER TERM, 1906

UNITED STATES OF AMERICA, complainant,
v.
THE STATE OF MICHIGAN, defendant.

Equity. Original. No. [illegible]

ON DEMURRER.

BRIEF FOR THE COMPLAINANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

UNITED STATES OF AMERICA, complainant, *v.* THE STATE OF MICHIGAN, DEFENDANT.	Equity. Original, No. 13.

ON DEMURRER.

BRIEF FOR THE COMPLAINANT.

STATEMENT.

The legislature of Michigan, by joint resolutions, having importuned Congress on several occasions for aid in the construction of a canal around the Falls of St. Mary, in the river of that name in said State, an act of Congress was passed, which became operative on August 26, 1852, appropriating 750,000 acres of land, to be afterwards selected, to construct a ship canal and lock for the purposes asked. This act, which is to be found in 10 Stat. L., beginning on page 35, provided for locating the canal through public lands known as

the military reservation at Sault Ste. Marie by appropriating 400 feet of land in width extending along the line of said canal, and vesting the title of said land in the State of Michigan for the purposes of said canal and no other, the details of the route to be approved by the Secretary of War. This canal was to be at least 100 feet in width, with a depth of 12 feet, and the lock was to be 250 feet long and 60 feet wide.

The second section of the act appropriated 750,000 acres of public land, thereafter to be selected by agents to be appointed by the governor of the State, subject to the approval of the Secretary of the Interior, the lands to be taken from any land belonging to the Government within the State of Michigan which were subject to private entry.

Section 3 provided that the lands granted should be subject to the disposal of the State legislature for such purposes and no other; that the canal should be and remain a public highway for the use of the Government of the United States, free from toll or other charge upon the vessels of the Government engaged in the public service, or upon vessels employed by the Government in transportation of property or troops of the United States.

Section 4 provided that if the canal should not be commenced within three and completed within ten years, the State should be bound to pay the United States the amount which might be received from the sale of any part of said lands by the State at not less than $1.25 per acre, the title of the purchasers under said State remaining valid.

Section 5 provided that the legislature should keep account of the sales of lands, and of all expenditures for construction, repair, and operation of said canal, and of its earnings, and should return such statement annually to the Secretary of the Interior; that whenever the State should be fully reimbursed for all advances made for the construction, repairs, and operating of said canal, with legal interest on all advances until the reimbursement of the same, or upon payment by the United States of any balance of such advances over such receipts from said lands and canal, with such interest, the said State should be allowed to tax for the use of said canal only such tolls as should be sufficient to pay all necessary expenses for the care, charge, and repairs of the same.

Section 6 provided that before the State should dispose of any of the lands selected the route of the canal should be established and plats filed in the office of the War Department and a duplicate thereof sent to the Commissioner of the General Land Office.

The legislature of Michigan, at its session in 1853, passed an act providing for the construction of the canal, accepting the appropriation with all conditions therein expressed attached, and made obligatory upon the State. The governor was authorized to appoint commissioners and an engineer to look after the construction of the canal and provisions were made for the construction of the same, the expenses attendant upon

such construction to be paid out of lands appropriated by Congress. The act also provided for the keeping of the accounts connected with the construction, turning out of the lands to the contractor and subcontractor, and other matters connected with the work.

The lands were appropriated and certified to the State, and the bill alleges that all of the lands were sold and disposed of in some manner by the State, and that the State constructed the canal, or caused it to be constructed and put into operation, but the State of Michigan did not report to the Secretary of the Interior as required by the fifth section of the act of Congress, relative to the accounts of sales and proceeds of the lands appropriated and the expenditures for construction, repairs, and operation of the canal. The canal and lock were wholly constructed from the appropriation of these lands.

The tolls were, from time to time, fixed and moneys collected in excess of the amounts actually used during the period of their collection, though without intention upon the part of the State to make a profit from the management and control of the canal in violation of the act of Congress, but in order to have cash on hand to make repairs during the season when the canal was closed to navigation, or at any time when needed. The funds thus collected from tolls gradually increased in amount with increasing commerce through the canal until finally, when the canal was turned back to the United States, there was in the treasury of the State belonging to the canal fund, not appropriated or the expenditure thereof in any way provided for, the

acknowledged sum of $68,927.12. This sum of money had been collected in good faith by the State for the purpose of devoting the same ultimately to the repair, improvement, supervision, and expenses of managing the canal.

A large amount of tools and implements had been purchased and collected by the State from time to time in connection with its extension, repair, improvements, management and control by the State, and when the canal was turned back to the United States much of this property was on hand, all belonging and appertaining to the canal and to the State in its capacity as manager and controller thereof. It is not known whether any further or larger sum of money than that above stated was within the control of the defendant, or in its treasury, because no reports, annual or otherwise, have been made to the Secretary of the Interior, as provided by the act of Congress.

On March 3, 1881, an act of the Michigan legislature became operative, turning the canal over to the United States. This act provided for the transfer to the United States by the State of all property belonging to said canal and all moneys remaining in the canal fund, excepting so much as might be necessary to put the canal in repair for its acceptance by the United States, in accordance with the act transferring the same. Congress passed an act approved June 14, 1880, found in 21 Stat. L., 189, providing that the Secretary of War should accept the canal on behalf of the United States, and appropriating $250,000 to

improve and operate it. Thereupon, the canal was transferred to the officers of the United States connected with the War Department, but no tools, implements, or property of any kind were transferred with it, nor were any moneys transferred or turned over.

In the preamble of the act of the legislature of Michigan approved February 14, 1859, it was recited that the canal was a trust created by the act of Congress and the assent of the State thereto. It is alleged in the bill of complaint that the State treasurer, in his report to the legislature, designated the State simply as a trustee in connection with the building and maintenance of the canal and the retention of the funds in the treasury.

The legislature of the State of Michigan, however, instead of paying over the money, by joint resolution in 1897 because the United States had not made demand for the money, provided that the money should be transferred to the general fund of the State and that the property should be sold and disposed of and the proceeds put in such general fund.

A demand was subsequently made upon the State of Michigan for the moneys in its hands connected with the canal and arising from the collection of tolls and sale of machinery, as well as for the machinery, which demand was refused by the officers of the State, including the governor and the State Board of Control of the canal.

The bill prays for an accounting as to the disposition of the lands, the management of the canal, control and sale of the property, and the payment of any

moneys found to be due the complainant, the turning over of any property still held by the State not disposed of, and general relief.

To this bill the defendant has filed a demurrer denying that the State was ever trustee of the Government and alleging that the same appears from the face of the bill itself, and denying that, under the statements contained in the bill, there is any ground for the relief prayed for, and alleging laches upon the part of the Government of the United States.

Argument.

The first four paragraphs of the demurrer mean practically one and the same thing, viz, that the State was not a trustee, but a donee subject to the one condition, namely, the free use of the canal by the Government. The other proposition, briefly stated, is that the Government has been guilty of laches.

The first and, as we believe, the only important consideration calls for a construction by this court of the act of Congress appropriating the land in connection with the previous resolutions of the legislature of Michigan requesting such appropriations, in connection with the act of the State legislature in accepting the appropriation and in constructing, operating, and finally returning the canal to the United States. Our leading proposition is that such construction will serve to show that the acts of both parties contemplated and constituted a mixed trust and power.

A mixed trust and power is where the settlor sketches the outlines of a trust and leaves the

> details to be settled and carried into effect, according to the best judgment of his trustee. The power joined to the trust in such case is imperative and must be exercised; but the mode of its execution is a matter of judgment and discretionary. (Perry on Trusts, par. 20.)

It is competent for a State to act as trustee. The lands appropriated as well as the right of way granted were both proper subjects for a trust. The purpose to be accomplished, namely, the construction of a canal to be operated for the public benefit, was a proper object to be obtained. The State was a proper party to take upon itself the construction and operation of the canal, as it was to accept the office of trustee for the sale of the public lands.

A careful analysis of the various acts quoted or cited in the bill of complaint will be instructive at the beginning of this argument. It is contended by the demurrer that there is no trusteeship upon the part of the State, and that is the main proposition here involved.

THE TRUST-CREATING ACT.

The act (which may be found in the printed bill of complaint, pages 2 et seq.) has a twofold purpose: first, the granting of an ~~assignment~~ easement or right of way through the public domain for the purpose of constructing the canal; second, the appropriation of lands and the disposal of the same, the construction of the canal, and its operation and maintenance. The first section of the act is devoted entirely to the first-named proposition. It is true that the term "granted" is repeatedly used

in this section, but it will also be observed that the property in such grant, while vested in the State forever, is for the "purposes aforesaid and no other." These last words, we insist, are express limitations upon the grant, and serve to show that it was the intention of the Government not to invest the State with unqualified ownership in the canal, but simply with the management and control of the same. The provisos in this section as to the location, line of survey, width and depth of the canal, as well as the dimensions of the lock, all serve to indicate that Congress intended that it should be constructed in a certain way under the approval of the Secretary of War and in a manner and with such dimensions as Congress did not see fit to leave open to dispute. It was as if Congress had intended to appoint an agent and to prescribe the manner in which the agent should perform the duties intrusted to him.

If the defendant should put special stress upon the terms "grant" or "granted," as used in this section, we contend that the same is not justified by the general provisions of this first section of the act. This court held long ago, in respect to a very similar act, that the word "grant" is not a technical word like "enfeoff," and we think the word, if used broadly and without limitation, would carry with it an estate in the thing granted, yet if used in the restricted sense, the grantee would take but a naked trust for the benefit of the grantor. This doctrine will be found very clearly stated in the decision of Mr. Justice Clifford, in *Rice* v.

Railroad Company (1 Black, 378). Construing the grant in that case, this language was used:

> Certain lands are granted to the territory by the first section to be held by it for a specific use and purpose, to wit, for the construction of a specific public improvement, to be exclusively applied to that purpose without any restriction except that the lands could be disposed of only as the work progressed. To carry out that purpose the lands were declared by the third section to be subject to the future disposal of the territorial legislature, but in no event should they inure to the benefit of any county not previously constituted or organized. Neither of these sections contain any words which necessarily absolutely vest in the territory any beneficial interest in the thing granted. Undoubtedly the words employed are sufficient to have that effect, and if not limited by the context or other parts of the act they would properly receive that construction, but the word "grant" is not a technical word like the word "enfeoff" and although if used broadly without limitation or restriction it would carry an estate or interest in the thing granted, still it may be used in a more restricted sense and be so limited that the grantee will take but a naked trust or power to dispose of the thing granted and to apply the proceeds arising out of it to the use and benefit of the grantor. Whenever the words of a statute are ambiguous or the meaning doubtful the established rule of construction is that the intention must be deduced from the whole statute and every part of it.

Not only is this language applicable, but we believe that the whole case from which it is quoted is so far in line with this one as to make it a clear guide herein, if not absolutely decisive hereof.

The second section of this act appropriates the land for the completion of the canal, 750,000 acres in extent, and here again it is provided that the selection shall be by subdivisions according to the Government survey, and be made by State agents from any land in the State, and that the action of the State thus provided for shall be subject to the approval of the Secretary of the Interior.

The third section is further limiting in its character. While the land shall be subject to the disposal of the legislature of the State, it shall be "for the purposes aforesaid and no other." Again, the canal shall be and remain a public highway for the use of the Government, free from toll or charge on any vessel in the public service or in the transportation of Government property or troops.

Section 4 provides that the canal must be commenced within three years and completed within ten years or the money received from the sale of the lands must be paid back to the United States. This section alone serves to demonstrate almost beyond controversy the fact that the State was to have no beneficial interest in this canal or the lands appropriated therefor. Though the lands might be disposed of at once and good title vested by the State in the purchasers thereof, yet all the proceeds of the sales must be returned to the

United States if the canal should not be constructed within the time prescribed.

But section 5 is still stronger. If it was the intention of Congress that the State should own, or even have any beneficial interest in the canal or in the lands, the entire section 5 was without purpose or effect. The section applies both to the canal constructed and the lands granted to be sold for its construction, because it is expressly provided that the legislature must keep account of sales, proceeds, expenditures, construction, repairs, operations, and earnings, and all should be annually reported to the Secretary of the Interior. If this was a mere donation or grant and this act was intended to convey a beneficial interest to the State in the right of way and the lands to be sold, why should the Government make these provisions and continue its interest in the proceedings? But even with this part of the section evidence of the intention of Congress does not cease, for provision immediately follows, upon the supposition, doubtless, that the State might temporarily use some of its moneys in the construction of the canal in advance of receipts from the sale of lands; that when such advances shall be reimbursed to the State, or when the United States shall pay the State any balance of such advances over receipts from the lands and the canal, then the State shall be allowed to tax for its use tolls only sufficient to pay the necessary expenses for care, charge, and maintenance. What would be the purpose of reimbursing the State for that

which it might incidentally put into the project if the State was to own the canal or receive any special beneficial interest in that which is granted by the terms of this act? In whose interest would Congress require that tolls should be kept down to actual operating expenses? Plainly, we answer, in the interest of the public. What public? The people of the United States, acting through their representatives in Congress.

It was the intention of Congress, then, that this canal, while nominally in the hands of its agent or trustee, should really be not only the property of the United States, but be constructed for its benefit. True, the State of Michigan might be more directly interested for its people in the construction of the canal on account of its location and interests than other States, but the work nevertheless was a public one, for all classes and all sections, and only peculiar to Michigan because that State was intrusted with the construction and operation of the canal.

Section 6 of the act is also one of limitation and, as a safeguard, provides that no lands should be disposed of until the preliminary of filing plats of the route in the War Department or General Land Office should be taken.

Under the second section of the act, if the construction contended for by the defendant should prevail, all the other sections of this act, important as they are in character, might have been left out and must be treated as silent and dead in its consideration. This carries us back to the language used by Mr. Justice

Clifford in *Rice* v. *Railroad Company*, above quoted from. Quoting from where we left off, he says:

> The intention in such cases must govern when it can be discovered, but in the search for it the whole statute must be regarded and, if practicable, so expounded as to give effect to every part. That rule can not be applied to this case if it be admitted that the beneficial interest in the lands passed to the Territory, because it is expressly provided by the fourth section of the act that no title shall vest in the Territory of Minnesota, nor any patent issue for any part of the lands, until a continuous length of 20 miles of road shall be completed. Unless that whole provision, therefore, be rejected as without meaning, or as repugnant to the residue of the act, it is not possible, we think, to hold that the Territory acquired a vested interest in the lands at the date of the act.

THE TRUST-ACCEPTING ACT.

We come now to the acceptance of this trust by the State of Michigan. The text of that act is quoted in the bill of complaint, beginning on page 5. The first section accepts and agrees to all the conditions expressed in said act, and makes them obligatory upon the State. It may here be observed with propriety that the legislature does not accept sections 1 and 2 of the act of Congress, but includes all the conditions expressed in the other four sections, sacredly promising in the beginning to fulfill each and every one of them. Nothing could be more definite. Nor can anything be more expressive than the language contained in section

2 of the act of the legislature. "For the purposes of carrying out the objects of said act," is the language used. If the State of Michigan had expected or understood that it was about to commence the construction and obtain the ownership of a great work to its own use and benefit, why should the language "for the purposes of carrying out the objects of said act * * * in conformity with the provisions of said act of Congress" be used?

Again, in section 3 (p. 7, bill of complaint) this language is used relative to the responsibility of persons bidding for the contract to construct the canal:

> And his or their ability to carry into effect the object and intention of said act of Congress by constructing said canal in the best and most expeditious manner.

It seems to have been the plan of the State from the start to turn over the lands appropriated in payment for a completed canal. Such purpose is shown by the provisions of section 5, found on page 8 of the bill, that all preliminary expenses should be paid out of the State treasury, but as fast as the same is done the contractors who were to receive the lands must pay the State back again for these disbursements, thus saving the State, out of the lands appropriated, harmless from any except the most temporary investment of money in this project. Provision is also made in this section for making a report to the General Land Office of the United States.

Again, section 7 provides for an annual report by

the governor to the Secretary of the Interior, in accordance with the requirements of the act of Congress. We have thus covered such provisions of the act as seem pertinent to the question under consideration.

THE STATE'S SUBSEQUENT ATTITUDE.

The above act was passed and approved February 5, 1853. To show how the authorities of the State regarded this matter, as early as February 14, 1859, in a preamble to act No. 175 of the session laws of Michigan for that year, the following language is made use of and it is quoted in the bill of complaint:

> Whereas such canal, having been built and accepted by the authorities of this State, is found to need repairs in order to its preservation and usefulness and the due performance *of the trust created by said act of Congress* and the assent of this State thereto, etc. (Italics are ours.)

Later on, in the report of the treasurer of the State of Michigan, who was himself one of the board of control of the St. Marys Falls Ship Canal, for the year 1883, such report having been made to the governor and transmitted to the legislature as usual, the following language was used:

> Since my last report the remainder of the personal property belonging to the St. Marys Falls Ship Canal has been sold, making a final balance in that fund of $68,927.12. The business appertaining to the management of the canal on the part of the State has ceased and

the moneys in the fund remaining in the State treasury under act No. 17, laws of 1881, the State acting simply as *trustee*.

We have thus reviewed the act of Congress in creating the trust, the act of the legislature of Michigan accepting the same, the subsequent act of the legislature defining it as a trust, the report of a member of its board of control even after it had been turned back to the Government showing, at least, the amount named as being in the treasury to the credit of the canal fund and designating it as a trust.

THE CONVERSION OF THE FUND.

Notwithstanding the attitude of the State as above shown, the State of Michigan never paid the money over, but at a later date, by joint resolution No. 20 of the public acts of 1897, proceeded to convert the fund to its own use by transferring it from the canal fund to the general fund, the language of the joint resolution being as follows:

> Whereas there has remained to the credit of the St. Marys Ship Canal fund a credit balance which was on hand at the time of the transfer of the said canal from the State to the United States, and no claim has been made for any part of such moneys, either by persons who paid the same into the fund or by the General Government; and
>
> Whereas, there now remains on hand, under the board of control of the St. Marys Ship Canal, an invoice of tools and machinery, and no demand by any person or persons or by the

United States having been made for a transfer of said tools and machinery: Therefore,

Resolved by the senate and house of representatives of the State of Michigan, That the auditor-general be, and he is hereby, directed to transfer such balance as shown upon the books of his office to the same, and it shall hereafter become a part of the general fund of the State.

And be it further resolved, That the board of control of the St. Marys Ship Canal be, and they are hereby, authorized to dispose of, at the best possible advantage, the tools and machinery aforesaid and now under their control, and deposit the money received from the sale of said property in the general fund of this State.

OTHER WRONGS.

But the recovery of this fund is not the only relief sought by the bill. It must be remembered that absolutely no account has ever been rendered by the State of Michigan to the complainant, as appears from the bill of complaint—

First, of the construction of the canal.

Second, the sale and disposition of the lands.

Third, the operating expenses of the canal.

Fourth, of the tolls collected by the State.

Fifth, of the repairs made by the State.

It seems to us, so far as the purposes of the demurrer are considered, that the complainant is entitled to a full and complete examination of these various requirements of the act of Congress irrespective of the balance converted to the State's general fund by the joint

resolution hereinbefore quoted. There is no method whereby such a report can be secured except by the order of the court in this proceeding. It is possible that mandamus might have been made use of from time to time to compel the State to do its bounden duty, but if our theory that the State is a trustee is correct, a court of equity would also at all times have jurisdiction to examine into the affairs of the trust, and equity would be a much more complete remedy than mandamus, for the reason that the State, even if it should make a report and such report indicated that the State had not in any of these particulars fulfilled its duty to complainant, some proceeding would then have been required to compel the State to make amends for its failure properly to perform its duties as trustee.

LACHES.

The doctrine that laches will not apply to a proceeding in equity instituted by the United States is so well settled that it would seem almost unnecessary to consider that question, which is raised in the fifth assignment of causes for demurrer. It was by the act of the State of Michigan itself, taking the initiative, that the trust was surrendered and the canal turned over to the Government of the United States. It then became the duty of the State to fulfill its trust and to fulfill the terms of its act transferring the property and belongings of the canal to the Government. The duty of a trustee to make an accounting when called upon is so plain that no argument should be required relating thereto. The bill shows that an accounting has

been asked for by the Department of Justice for and in behalf of the United States and that the authorities of the State have refused to make such accounting, as well as to pay over any funds which they may have in their hands. They now set up the doctrine of laches to save themselves the performance of that duty. A line of Federal cases may be cited and briefly quoted from upon this point.

In *United States* v. *Beebee* (127 U. S.) the following language is used, at page 338:

> The principle that the United States is not bound by any statute of limitations nor barred by any laches of its officers, however gross, in a suit brought by it as a sovereign government to enforce a public right or to assert a public interest is established past all controversy or doubt.

In *United States* v. *Dalles Military Road Co.* (140 U. S., 559) the same doctrine is asserted, and from the opinion written by Mr. Justice Blatchford, on page 632, we quote the following:

> Besides, the defense of stale claim and laches can not be set up against the Government—

citing a large number of cases decided by the Supreme Court.

In the case of *San Pedro and Canyon del Agua Co.* v. *United States* (146 U. S., 120) the following language was used by Mr. Justice Brewer:

> This last matter is also a sufficient answer to the second point made by the appellant, and that is that the prosecution of this suit is barred

by laches, for it is well settled that when the Government has a direct pecuniary interest in the subject-matter of the litigation the defenses of stale claim and laches can not be set up as a bar.

In *United States* v. *Insley* (130 U. S., 263) Mr. Justice Blatchford repeats the language practically adopted by this court in equity cases where the Government is a party. We think further citations or quotations are unnecessary, as no question seems to have been raised for a long period of years of the correctness of this well-settled principle.

MARSDEN C. BURCH,

Special Assistant to the Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE UNITED STATES OF AMERICA, complainant, *v.* THE STATE OF MICHIGAN.	No. 13, Original. In equity. On demurrer.

MOTION TO ASSIGN FOR ARGUMENT.

Now comes the said complainant and, at the request of the defendant, moves the court that the hearing of argument on the demurrer of defendant to the complainant's bill be set down for Monday, April 20, 1903, or at such other date during the present term of this court as by the court may be determined.

HENRY M. HOYT,
Solicitor-General of the United States.

MARSDEN C. BURCH,
Solicitor for Complainant.

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O. T. 1906

In the Supreme Court of the United States.

OCTOBER TERM, 1906

UNITED STATES OF AMERICA, complainant,
v.
THE STATE OF MICHIGAN, defendant.

In Equity. Original, No. 4

MOTION FOR LEAVE TO FILE REPLICATION.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

UNITED STATES OF AMERICA, complainant, *v.* THE STATE OF MICHIGAN, defendant.	In Equity. Original, No. 10.

MOTION FOR LEAVE TO FILE REPLICATION.

And now comes the said complainant, by Henry M. Hoyt, its Solicitor-General, and respectfully asks the court for permission to file its replication, herewith submitted, in the above-entitled cause.

HENRY M. HOYT,
Solicitor-General of the United States.

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4 Orig'l.

O. T. 1906

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

UNITED STATES OF AMERICA, complainant, v. THE STATE OF MICHIGAN, defendant.	In Equity. Original No. 4.

REPLICATION.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

UNITED STATES OF AMERICA, complainant, *v.* THE STATE OF MICHIGAN, defendant.	In Equity. Original No. 10.

REPLICATION.

The replication of the United States of America, complainant, to the answer of the State of Michigan, defendant, made by leave of the court first had and obtained, respectfully shows:

This replicant, the United States of America, saving and reserving to itself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the defendant, the State of Michigan, for replication thereunto, saith that it doth, and will aver, maintain, and prove its said bill to be true, certain, and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive, and insufficient in law to be

replied unto by this replicant; without this, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, confessed, or avoided, traversed, or denied, is true, all which matters and things this replicant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

P. C. KNOX,
Attorney-General of the United States.
HENRY M. HOYT,
Solicitor-General.

MARSDEN C. BURCH,
Solicitor, and of counsel.

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In the Supreme Court of the United States.

OCTOBER TERM, 1903.

UNITED STATES OF AMERICA, complainant, *v.* THE STATE OF MICHIGAN, defendant.	In Equity. Original, No. 10.

MOTION FOR LEAVE TO FILE STIPULATION TO TAKE TESTIMONY.

Now comes the said complainant, by Henry M. Hoyt, Solicitor-General, and asks the court for permission to file a stipulation, signed by the solicitors and counsel for the respective parties hereto, providing for the taking of testimony, the time for taking the same, and for the appointment of a commissioner for that purpose.

And the said Solicitor-General now moves the court that an order be entered in accordance with the terms of said stipulation that proofs shall be taken, that the time for taking the same shall be fixed as provided in said stipulation, and the party named therein shall be appointed commissioner to take said proofs and return them to this court.

HENRY M. HOYT,
Solicitor-General of the United States.

19014—04



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In the Supreme Court of the United States.

OCTOBER TERM, 1903

UNITED STATES OF AMERICA, complainant,
v.
THE STATE OF MICHIGAN, defendant.

In Equity. Original, No. 4

STIPULATION TO TAKE TESTIMONY AND TO APPOINT COMMISSIONER.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

UNITED STATES OF AMERICA, complainant, *v.* THE STATE OF MICHIGAN, defendant.	In Equity. Original, No. 10.

STIPULATION TO TAKE TESTIMONY AND TO APPOINT COMMISSIONER.

It is hereby stipulated and agreed on the part of the United States, complainant herein, by Henry M. Hoyt, Solicitor-General, and Marsden C. Burch, solicitor and of counsel, on the one hand, and Charles A. Blair, attorney-general of the State of Michigan and solicitor and of counsel for the defendant, on the other hand, that the proofs in the above-entitled cause shall be taken for and on behalf of said complainant within ninety days from the time when an order to that effect shall have been entered by the court, and that the proofs for said defendant shall be taken within sixty days after the expiration of said ninety days; and that any rebutting proofs may be taken on the part of complainant

within thirty days from the expiration of the time for taking defendant's proof; provided, that the parties hereto may shorten or extend the time for taking and closing said proofs by stipulation to be signed by the respective solicitors and counsel.

And it is further stipulated and agreed between the parties hereto that Peter Doran, esq., an attorney and counselor-at-law and solicitor in chancery, of Grand Rapids, Michigan, may, with the approval of the court, be appointed commissioner for the purpose of taking such testimony and reporting the same to the court.

HENRY M. HOYT,
Solicitor-General.

MARSDEN C. BURCH,
Solicitor and of Counsel for Complainant.

CHAS. A. BLAIR,
Attorney-General of the State of Michigan, Solicitor for Defendant.

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4 Orig'l.
C.T.1906

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1906

THE UNITED STATES OF AMERICA, COMPLAINANT,
vs.
THE STATE OF MICHIGAN, DEFENDANT.

IN EQUITY.
Original
No. [illegible] # 4

MOTION FOR LEAVE TO FILE DEMURRER AND NOTICE.

HORACE M. OREN,
Attorney General of the State of Michigan,
Solicitor for Defendant.
(Lansing, Mich.)

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1902.

THE UNITED STATES OF AMERICA, COMPLAINANT, vs. THE STATE OF MICHIGAN, DEFENDANT.		IN EQUITY. Original No. 13.

And now comes the said defendant by its solicitor, Horace M. Oren, attorney general of the state of Michigan, and respectfully asks this Court for permission to file its demurrer, herewith submitted, in the above entitled cause.

Dated, November 26th, A. D. 1902.

Horace M. Oren

Attorney General of Michigan,
Solicitor for Defendant.

Business address: Capitol, Lansing, Mich.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1902.

THE UNITED STATES OF AMERICA, COMPLAINANT, vs. THE STATE OF MICHIGAN, DEFENDANT.	}	IN EQUITY. Original No. 13.

SIR—Please to take notice that on Monday, the 8th day of December, 1902, I will apply to the said Court by motion for permission to file a demurrer to the bill of complaint filed in the above entitled cause.

You are herewith served with a copy of said motion and demurrer.

Dated, this 26th day of November, A. D. 1902.

Horace M. Oren

Attorney General of Michigan,
Solicitor for Defendant.

To John K. Richards,
Solicitor General,

Marsden C. Burch,
Solicitor and of Counsel, for said Complainant:

STATE OF MICHIGAN, } ss.
County of Ingham. }

Henry E. Chase, Deputy Attorney General of the State of Michigan, being first duly sworn, deposes and says, that he caused a copy of the foregoing motion and notice, together with a copy of the demurrer therein referred to, to be served upon the said complainant, by depositing copies thereof, enclosed in a sealed envelope, with postage fully prepaid thereon, and properly addressed to John K. Richards, Solicitor General of the United States, Washington, D. C., in the United States Postoffice at Lansing, Michigan, on the 26th day of November, 1902, and by depositing copies thereof, enclosed in a sealed envelope, with postage fully prepaid thereon, and properly addressed to Marsden C. Burch, Washington, D. C., in the United States Postoffice at Lansing, Michigan, on the 26th day of November, 1902.

Henry E. Chase

Subscribed and sworn to before me this 26th day of November, A. D. 1902.

D. B. Hinckley

Notary Public, Barry County, Michigan,
Acting in Ingham County.

4 Orig'l.

O. T. 1906

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1906

UNITED STATES OF AMERICA, COMPLAINANT, vs. THE STATE OF MICHIGAN, DEFENDANT.	IN EQUITY. Original No. ~~10~~ N 14

DEMURRER.

HORACE M. OREN,
Attorney General of the State of Michigan,
Solicitor for Defendant.

IN THE SUPREME COURT OF THE UNITED STATES.

UNITED STATES OF AMERICA.

October Term, 1901.

UNITED STATES OF AMERICA, COMPLAINANT, vs. THE STATE OF MICHIGAN, DEFENDANT.	}	IN EQUITY. Original No. 19.

The demurrer of the above named defendant, the State of Michigan, to the bill of complaint of the above named complainant, United States of America.

This defendant, by protestation, not confessing all or any of the matters or things in the said bill of complaint contained to be true in such manner and form as the same are herein set forth and alleged, doth demur to the said bill. And for causes of demurrer showeth,

First. That it appeareth by the complainant's own showing by the said bill that it is not entitled to the relief prayed by the bill against this defendant.

Second. That it appeareth from complainant's own showing by the said bill that the said defendant, the State of Michigan, was not, as a matter of law, the

trustee of the said complainant, in the management and control of said canal.

Third. That by virtue of the Act of Congress approved August 26, 1852, and the acceptance of the grant to the State of Michigan made thereby, and the completion of the St. Mary's Falls Ship Canal within the time prescribed by said Act of Congress, as it appears by the said bill, the said St. Mary's Falls Ship Canal became and was the property of the State of Michigan in all respects, except as to the rights reserved by the government of the United States under and by virtue of section 3 of said Act of Congress, to the use of the same free from toll or other charge upon vessels of the United States of America engaged in the public service, or upon vessels employed by it in the transportation of any property or troops of the United States.

Fourth. That it appeareth from complainant's own showing by the said bill that no part of the said sum of sixty-eight thousand nine hundred twenty-seven dollars and twelve cents remaining in the possession and under the control of defendant at the time said canal was turned over to the said complainant, belongs to said complainant, and that the said complainant is not entitled to an accounting from defendant for the whole or any portion thereof.

Fifth. That it appears by the said bill that the said complainant has been guilty of gross laches in regard to

the matters therein set forth, and that by reason thereof it is not entitled to the relief prayed for.

Horace M. Oren

Attorney General of the State of Michigan,
Solicitor for Defendant.

Business address, Capitol, Lansing, Mich.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

Horace M. Oren

Solicitor for Defendant.

Lansing, Michigan, October 9, 1902.

STATE OF MICHIGAN, } ss.
County of Ingham. }

Horace M. Oren, being duly sworn deposes and says that he is the Attorney General of the State of Michigan, and makes this affidavit for and on behalf of said State of Michigam; and that the foregoing demurrer is not interposed for delay.

Horace M. Oren

Subscribed and sworn to before me this 9th day of October, A. D. 1902.

D. B. Hinckley

Notary Public, Barry county, Michigan, acting in Ingham county.

FILE COPY.

Office Supreme Court U.S.
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APR 16 1903
JAMES H. McKENNEY,
Clerk.

4 Orig'l.
C.T.1906

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1906

UNITED STATES OF AMERICA,
COMPLAINANT,
v.
THE STATE OF MICHIGAN,
DEFENDANT.
} Equity. Original, No. 12 AL 40

ON DEMURRER.

BRIEF FOR DEFENDANT.

IN THE SUPREME COURT OF THE UNITED STATES.

IN EQUITY. ORIGINAL No. 13.

October Term, 1902.

UNITED STATES OF AMERICA,
Complainant,

vs.

THE STATE OF MICHIGAN,
Defendant.

ON DEMURRER.

Brief for Defendant.

Statement.

In the complainant's bill of complaint two acts of Congress and six acts of the Legislature of the State of Michigan are referred to, as follows, viz.:

ACTS OF CONGRESS.

1. An act approved August 26, 1852, entitled "An Act granting to the State of Michigan the right of way and a donation of public lands for the construction of a ship canal around the Falls of St. Mary's in said State."

2. An act approved June 14, 1880, entitled "An Act making appropriations for the construction, repair, completion and preservation of certain works on rivers and harbors, and for other purposes."

ACTS OF THE LEGISLATURE OF MICHIGAN.

1. Act No. 38, Laws of Michigan 1853, entitled "An Act to provide for the construction of a ship canal around the Falls of St. Mary."

2. Act No. 91, Laws of Michigan 1885, entitled "An Act to provide for the collection of tolls, and for the care, charge and operation of the St. Mary's Falls Ship Canal."

3. Act No. 175, Laws of Michigan 1859, entitled "An Act to provide for the repairing, preservation, and operation of the ship canal around the Falls of St. Mary, and to perform the trust respecting the same."

4. Joint Resolution No. 39, Laws of Michigan 1869, entitled "Joint Resolution authorizing the Board of Control of the St. Mary's Falls ship canal to transfer said canal to the United States."

5. Act No. 17, Public Acts 1881, entitled "An Act to authorize the Board of Control to transfer the St. Mary's Falls ship canal, with the property belonging to the same, to the United States."

6. Joint Resolution No. 20, Public Acts 1897, entitled "Joint Resolution to provide for the transfer of certain funds to the general fund."

Counsel for complainant have printed some of these acts in their entirety, but have only made excerpts from or stated certain of the provisions of the balance.

While counsel for defendant admits to the fullest extent that by his demurrer he has, so far as this hearing is concerned, accepted as true the statement contained in complainant's bill, yet he considers that it is no deviation from the rule, to print in this brief two of the acts above referred to upon which complainant's bill is based and which are incompletely set forth therein, in order that this court may

be conveniently provided with certain of the facts which should properly be considered on this hearing. The first is as follows:

ACT No. 17, PUBLIC ACTS 1881.

"An act to authorize the board of control to transfer the Saint Mary's Falls ship canal, with the property belonging to the same, to the United States.

Whereas, Congress at its last session included in the river and harbor bill the following:

For improving and operating the Saint Mary's river and Saint Mary's Falls canal, two hundred and fifty thousand dollars. "And the Secretary of War is hereby authorized to accept on behalf of the United States from the State of Michigan the Saint Mary's canal and the public works thereon: Provided, Such transfer shall be so made as to leave the United States free from any and all debts, claims or liability of any character whatsoever, and said canal after such transfer shall be free for public use: And provided further, That after such transfer the Secretary of War be and hereby is authorized to draw from time to time his warrant on the Secretary of the Treasury to pay the actual expenses of operating and keeping said canal in repair;" therefore,

SECTION 1. *The People of the State of Michigan enact,* That the board of control of the Saint Mary's Falls ship canal be and hereby is authorized and directed to transfer the said canal and the public works thereon, with all its appurtenances and all the right and title of the State of Michigan in and to the same, to the United States in accordance with (the) provisions of the above mentioned clause: Provided, That this cession is upon the express con-

dition that the State of Michigan shall so far retain concurrent jurisdiction with the United States over the Saint Mary's Falls ship canal, and in and over all lands acquired or hereafter acquired for its use; that any civil or criminal process issued by any court of competent jurisdiction, or officers having authority of law to issue such process, and all orders made by such court, or any judicial officer duly empowered to make such orders, and necessary to be served upon any such person, may be executed upon said Saint Mary's Falls ship canal, its lands, and in the buildings that may be erected thereon, in the same way and manner as if jurisdiction had not been ceded as aforesaid.

SEC. 2. The board of control of the Saint Mary's Falls ship canal are hereby authorized and empowered, at any time when they may deem it proper, to transfer all material belonging to said canal, and to pay over to the United States all moneys remaining in the canal fund, excepting so much as may be necessary to put the said canal in repair for its acceptance in accordance with the act above recited: Provided, Such transfer of material and payment of moneys shall be in consideration of the construction, by the United States, of a suitable dry dock, to be operated in connection with the Saint Mary's Falls ship canal for the use of disabled vessels.

This act is ordered to take immediate effect.

Approved March 3, 1881."

The second is the Joint Resolution of 1869, and is as follows:

JOINT RESOLUTION No. 39, LAWS OF MICHIGAN 1869.

"Joint Resolution authorizing the board of control of the St. Mary's Falls ship canal to transfer said canal to the United States.

Whereas. The immediate enlargement of the St. Mary's Falls canal by which Lake Superior is rendered accessible to vessels, is a work of urgent necessity and national importance;

And Whereas, The State of Michigan has no funds properly applicable to such purpose;

Resolved by the Senate and House of Representatives of the State of Michigan, That the board of control of the St. Mary's Falls ship canal be, and it is hereby authorized and directed to transfer the said canal, with all its appurtenances, and all the right and title of the State of Michigan in and to the same, to the United States: Provided, This State shall be first guaranteed and secured to the satisfaction of said board of control, against loss, by reason of its liability upon the bonds issued under and by authority of an act, entitled 'An Act to provide for the repairing, preservation and operation of the ship canal around the Falls of St. Mary, and to perform the trust respecting the same,' approved February fourteenth, eighteen hundred and fifty-nine.

Approved April 3, 1869."

With this premise, the facts of this case can be stated briefly but comprehensively as follows:

1. By act of Congress approved August 26, 1852, the United States made a grant to the State of Michigan of a right of way for a ship canal around the rapids or falls of the St. Mary's River and of 750.000 acres of public lands to

aid the State in its construction, subject to the conditions and terms expressed in the act.

2. By Act No. 38, Laws of Michigan 1853, this grant was accepted and the conditions thereof agreed to and made obligatory upon the State, and the construction of the canal was ordered.

3. By Act No. 91, Laws of Michigan 1855, the Legislature made provisions for the care, charge and operation of the completed canal, the collection of tolls, etc.

4. The canal was operated and tolls collected from 1855 to 1881, but no annual reports were rendered to the Secretary of the Interior as provided for in the Act of August 26, 1852.

5. By Joint Resolution No. 39, Laws of Michigan 1869, the Legislature offered to transfer the canal and its appurtenances to the United States, provided the State was guaranteed from loss on account of bonds that it had issued in 1859 to make needed repairs upon the canal and which were in part outstanding, and for the payment of which the canal tolls and the full faith and credit of the State was pledged.

6. By the Act of Congress approved June 14, 1880, the Secretary of War was authorized to accept on behalf of the United States from the State of Michigan, the St. Mary's canal and the public works thereon: Provided. Such transfer should be made so as to leave the United States free from any and all debts, claims or liability of any character whatsoever; said canal after such transfer to be free for public use.

7. By Act No. 17, Public Acts of Michigan 1881, the board of control of the St. Mary's Falls ship canal was authorized and directed,

First. "To transfer the said canal and the public works thereon, with all its appurtenances and all the right and title of the State of Michigan in and to the same to the United States," in accordance with the provisions of the Act of Congress approved June 14, 1880; and

Second. "At any time when they may deem it proper, *to transfer all material belonging to said canal, and to pay over to the United States all moneys remaining in the canal fund* excepting so much as may be necessary to put the said canal in repair for its acceptance in accordance with the act above recited: Provided, *Such transfer of material and payment of moneys* shall be in consideration of the construction, by the United States, of a suitable dry dock, to be operated in connection with the St. Mary's Falls ship canal for the use of disabled vessels."

8. At the time the transfer was made there was a large amount of money realized from tolls and earnings of this canal in the treasury of the State to the credit of the "Canal Fund," and in 1883 the balance was $68,927.12.

9. It is not alleged in complainant's bill of complaint that a dry dock was ever constructed by the United States or operated in connection with its canal.

10. By Joint Resolution No. 20, Public Acts 1897, the balance held in the "canal fund" was transferred to the "general fund" of the State, and the board of control of the St. Mary's Falls ship canal was authorized to dispose of the tools and machinery referred to in Act No. 17, Public Acts 1881 and deposit the money received therefrom in the general fund.

11. The State has refused to turn this money over to the United States upon demand of the Attorney General.

The action that has been brought by the United States is primarily and solely an effort *to enforce a money demand*, in which the claim is made that the United States is entitled to have and receive from the State of Michigan,

First. The $68,927.12 which was in the treasury of the State to the credit of the St. Mary's Falls ship canal fund at the time the canal was turned over to the general government and which had accrued from the net receipts derived from canal tolls, etc., and

Second. The proceeds from the sale of all material, tools and personal property appertaining to said canal and on hand when it was turned over; and

Third. The entire amount realized by the State from the sale of the lands granted to aid in the construction of the canal and the entire earnings thereof, less only such proper disbursements and expenditures as the State was entitled to be reimbursed for and to retain, under the provisions of the Act of August 26, 1852; it being the theory of the complainant that, inasmuch as the State had wholly failed to report to the Secretary of the Interior as required under said act, the United States is entitled to have a full accounting and a decree for the balance found on such accounting to be due and owing by the State.

It is not conceivable that the department of justice has invoked the jurisdiction of this court merely to have supplied to the Department of the Interior for mere historical or statistical purposes the data regarding the construction and operation of this canal which it charges the officers of the State with having failed to report. For even though unreported to the Secretary of the Interior, the records of this canal, its earnings, its rates of toll, the expenses of its operation, repair, improvement and maintenance for each year of its operation by the State of Michigan fully appear

in the printed documents of the State; and the information regarding its construction and the application of the land grant and everything else that is sought to be inquired into is a matter of complete record in the proper departments of the State. The information to be found in these printed documents and records is accessible to the officers of the government and would no doubt be furnished on request if it were deemed desirable that they be made a part of the files of the office of the Secretary of the Interior.

But it is not on account of the failure of the officers of the State to make an annual report to the Secretary of the Interior that this suit is brought, but because the Department of Justice deems it incumbent upon it to assert and enforce what it esteems to be the right of the United States to have and receive from the State everything that the latter has received by the way of tolls, sales of land, receipts from other sources appertaining to the operation of the canal over and above its lawful disbursements for constructing, operating and repairing the same.

The theory of the Department of Justice is that the State had no beneficial interest in the canal and the lands granted for its construction, that it was in effect a trustee for the United States, and that it is bound to account to the latter for any *profits* that may have accrued from its trust estate.

The State, on the contrary, by the demurrer it interposes, denies that its relation to the United States was that of a trustee.

It denies that the United States can be considered as the *cestui que trust* to whom it is accountable for the balance of its canal fund or for any moneys that should rightfully have been there.

It asserts that its title to the canal and to the lands granted to aid in its construction became absolute, uncon-

ditional and indefeasible upon its acceptance of the grant and the completion of the canal, and that by right of such ownership to it belongs any incidental pecuniary benefits or earnings that may have arisen from its operation of the canal.

ARGUMENT.

I.

BY ITS ACCEPTANCE OF THE ACT OF AUGUST 26, 1852, AN ABSOLUTE AND INDEFEASIBLE TITLE IN FEE TO THE EASEMENT OR RIGHT OF WAY FOR THE PROPOSED SHIP CANAL WAS VESTED IN THE STATE OF MICHIGAN.

First. *The "words of grant" found in the act are such as are commonly employed to vest a fee title and a beneficial interest in the grantee.*

The essential words of conveyance or grant of the canal right of way will be found in the first section of the act, and are as follows:

"The same is hereby *granted* to be used by said State, or under the auhority thereof, for the construction and convenience of such canal, and the appurtenances thereto and the use thereof is *hereby vested in said State* FOREVER."

That these words are such as are ordinarily used by Congress to vest in grantees a fee title, cannot be disputed.

In the case mainly relied upon by counsel for complainant, viz., Rice vs. Railroad Company, 1 Black, 358, this court had under consideration an Act of Congress approved June 29, 1854, entitled "An Act to aid the Territory of Minnesota in the construction of a railroad therein." The words of grant in that act were as follows:

"That there be, and is hereby *granted*" without other words than the designation of the lands to which the grant was intended to apply; and in the fourth section of the act was the express proviso that "*No title shall vest* in the said Territory of Minnesota, nor shall any patent issue * * * *until* a continuous length of *twenty miles of said road shall be completed.*"

Construing the words employed in connection with the proviso, Justice Clifford says on page 378:

> "*Undoubtedly the words employed are sufficient to have that effect;* (viz., the effect of absolutely vesting in the Territory a beneficial interest in the property granted) and, *if not limited or restricted by the context or other parts of the act* they would probably receive that construction."

He also says on the same page that the word "grant" "if used broadly, without limitation or restriction would carry an estate or interest in the thing granted;" and were it not that he found in the clause "no title shall vest until twenty miles of road shall be completed," a condition precedent to the vesting of title, he would probably have sustained the grant as irrevocable. Justice Nelson in a dissenting opinion in the same case holds that it was irrevocable regardless of the condition. He says:

> "This is a conditional grant, the condition particularly specified in the fourth section. The condition is, the construction of twenty miles of the road, when one hundred and twenty sections are to be conveyed, and so on. The idea seems to be that a conditional grant of this description may be revoked, *but not one absolute in its terms.* I am not aware of any such distinction. Certainly none is to be found. At com-

> mon law or in equity a conditional grant is just as obligatory and indefeasible between the parties as one that is absolute. The grant carries with it not only the right, but the obligation, of the grantee to fulfill the condition; and until the failure to fulfill, the obligation is complete and the grant irrevocable."

There is substantial concurrence in these opposing opinions that the grant there under consideration did not lack of words implying the vesting of an absolute estate of interest. The revocability arose chiefly from the condition precedent to the vesting of title expressed in the act.

But in the grant now under consideration there are no "conditions precedent" expressed. Note also the more weighty character of the words of grant. The right of way is not only *granted*, but is *vested forever* in the State.

It will not be contended but that the owner of an unconditional fee estate has a beneficial interest in the property thus held, and that when a grantor conveys to a grantee such an estate it is presumptively intended to vest in the grantee a beneficial interest; and unless there are conditions expressed in the grant expressly negativing the vesting of such an interest, or unless the title held or conveyed is granted for the purpose of establishing a trust or a mere power, a beneficial interest in, and the absolute ownership of, the returns from the use of the property by its owner is bound to be held to exist.

Second. *The limitations upon the use of the canal imposed by the act in question cannot be considered as "conditions subsequent" intended to operate in possible impairment of an otherwise indefeasible title but as covenants of the grantee enforceable only through actions in that behalf and not by forfeiture or defeasance of the estate granted.*

There are six provisos, conditions or limitations attached to this grant, viz.:

The *first* is the limitation of the use to which the easement granted may be put. It is limited to canal purposes.

The *second* relates to the identification of the property granted, and gives the State the alternative of locating its canal on the line of a previous survey, or selecting such other route as might be approved by the Secretary of War, the language of the proviso being as follows:

> "Provided, That in locating the line of said canal through said military reservation the same shall be located on the line of the survey heretofore made for that purpose, or such other route between the waters above and below said Falls, as, under the approval of the Secretary of War, may be selected."

The *third* relates to the action of the State in the construction of the canal, and requires the canal to be of certain dimensions, the language used being as follows:

> "And provided further, That said canal shall be at least one hundred feet wide. with a depth of water twelve feet, and the locks shall be at least two hundred and fifty feet long and sixty feet wide."

The *fourth* relates to the future operation of the canal, and requires as follows:

> "And the said canal shall be and remain a public highway for the use of the Government of the United States, free from toll or other charge upon the vessels of said Government engaged in the public service, or upon vessels employed by said Government in the transportation of any property or troops of the United States."

The *fifth* also relates to the future operation of the canal, and the tolls that might be collected for the use thereof. This provision is more intimately associated with the grant of land to aid in the construction of the canal than the grant of the right of way, but it is none the less expressed as a limitation upon the authority of the State to impose tolls. Until the State was reimbursed for its expenditures in the construction of the canal it could charge such rates of toll as it chose. But after it was fully reimbursed it was to be allowed to tax for the use of said canal *only such tolls as should be sufficient to pay all necessary expenses for the care, charge and repairs thereof.* (See section 5.)

The *sixth* relates to the report required to be made to the Secretary of the Interior, and is as follows:

> "The Legislature of said State shall cause to be kept an accurate account of the sales and net proceeds of the lands hereby granted and of all expenditures in the construction, repairs and operating of said canal and of the earnings thereof, and shall return a statement of the same annually to the Secretary of the Interior."

The theory of the Department of Justice is that it was manifestly the design of Congress not to grant to the State of Michigan, as respects this particular canal, what had been given to Illinois, Indiana, Ohio, and perhaps some of the other States; namely, grants of land to aid in the construction of canals *that were designed for possible profit* to the State through the income to be derived therefrom.

> See "An act to grant a quantity of land to the State of Illinois, for the purpose of aiding in opening a canal to connect the waters of the Illinois River with

those of Lake Michigan," approved March 2, 1827; also

"An act to grant a certain quantity of land to the State of Indiana. for the purpose of aiding said State in opening a canal to connect the waters of the Wabash River with those of Lake Erie," approved March 2, 1827.

In each of these acts there are no restrictions upon the tolls that the states may charge for the use of their respective canals, the only limitation imposed being that Government vessels should be passed free of tolls; and it is argued on behalf of the United States, that, by reason of this distinctive clause in the act under consideration by which the State of Michigan was inhibited from operating the canal for its own pecuniary profit or benefit, it is evident that Michigan acquired no such beneficial interest in this grant as did Indiana and Illinois in theirs.

Let us consider the operation and bearing of the first, fourth, fifth and sixth conditions, the second and third having no possible bearing upon the controversy.

Is it claimed on behalf of the United States that a failure on the part of the State to pass its vessels through the canal without toll or charge would have entitled it to revoke the title of the State?

Certainly this right of free toll which the United States reserves to itself is not expressed as a condition in possible impairment of the absolute estate previously granted.

Washburn on Real Property uses the following language:

"But it is said, 'if one makes a feoffment in fee, *ea intentione, ad effectum*, etc., that the feoffor shall do or not do such an act, these words do not make the estate conditional, but *it is absolute notwithstanding.* And yet where the grant is to a public or charitable

use and is expressed to be for a specific or limited purpose, the land cannot be appropriated to any other. If it is, the grantor retains sufficient interest in the subject-matter of the grant to apply to the court of chancery *to restrain such diversion.* The grant of a lot of land to set a meeting-house thereon does not imply a condition. And "an estate upon condition cannot be created by deed, *except where the terms of the grant will admit of no other reasonable interpretation.*"

It is undoubtedly true that the right of the general government to pass its vessels through the canal toll free could have been enforced if it were denied, by an appeal to this court in equity; or, if the State had sought to devote the easement granted to other uses than those to which it was expressly limited, redress could be found in the same forum. But certainly under the authority cited, the absolute estate which had been granted would not be determined or be subject to forfeiture for a breach of what, upon acceptance by the State, amounted to a mere covenant upon its part to permit the vessels of the United States to pass through the canal free of charge.

If such be the situation as to this provision it is difficult to find any basis for an argument that it would be any different in case the State violated the provision relative to the rates of toll generally. If, after the State had been fully reimbursed for its expenses in construction, etc., it had continued to impose tolls in excess of the necessary expenses for the care, charge and repairs of its canal, this certainly would not have been held to work a forfeiture of its title to the canal. The owners of vessels charged excessive rates would have been proper relators in an action to reduce the tolls. The United States itself might have intervened in

a proper proceeding to compel the State to observe the obligations of its covenant arising from the acceptance of the grant and not to exceed the stipulated rate of tolls. Ample redress could have been found through such proceedings without depriving the State of the title to this canal, which, by the solemn act of Congress, had been vested in it *forever*.

In reference to the clause requiring report to the Secretary of the Interior, the right to require such a report to be made could have been easily enforced. To predicate a defeasance upon such a provision would be unprecedented.

These several provisions of the grant are not expressed as "conditions" upon the estate granted, but rather as obligations that the State by its acceptance of the grant was bound to assume and carry out, not at the risk of losing its canal, but at the risk of being compelled by due process of law to perform.

Third. *The acts of both the United States and the State as expressed in legislation, negative the idea that the State's title of the canal was not absolute and indefeasible, and that the United States had an usufructory interest in the tolls or other earnings thereof.*

The counsel for complainant strongly contends that certain statutory declarations of the Legislature of the State of Michigan and reports of its public officers furnish evidence of a convincing character that the State did not consider that it held a beneficial interest in this canal.

But it is just as insistently urged on behalf of the State, that the Acts of Congress passed in reference to this canal, and the course pursued by the officers of the United States, indicates that Congress considered that the title which had been vested in the State by the grant of this right of way was absolute and indefeasible; and that any incidental bene-

fits that might arise, or had arisen, from the operation of the canal,—at least such benefits as did not arise from a breach of the conditions expressed in the grant,—belonged, by right of its ownership of the canal, to the State.

The solemn and especially weighty words of "irrevocable grant" contained in the act in question, and the construction of the conditions that were imposed, have already been considered. But there were later acts that have almost equal significance.

In 1869 by Joint Resolution No. 39 the Legislature of the State of Michigan offered to transfer to the United States "such canal, with all its appurtenances, and all the right and title of the State of Michigan in and to the same," subject to the proviso that the State should be "first guaranteed and secured to the satisfaction of said board of control, against loss, by reason of its liability upon the bonds issued under and by authority of an act, entitled "An act to provide for the repairing, preservation and operation of the ship canal around the Falls of St. Mary's, and to perform the trust respecting the same," approved February fourteenth, eighteen hundred and fifty-nine.

This offer was not acted upon by Congress until 1880, when by the act approved June 14, 1880, the Secretary of War was authorized "to accept on behalf of the United States from the State of Michigan, the St. Mary's canal and the public works thereon: Provided, Such transfer shall be so made as to leave the United States free from any and all debts, claims or liability of any character whatsoever, and said canal after such transfer shall be free for public use."

In neither of these acts is anything said about the transfer of moneys on hand in the State treasury derived from the operation of the canal. Certainly the offer of the State had

no reference to such moneys. The offer was limited to "the canal and its appurtenances." The acceptance was of the "canal and the public works thereon." Neither of the descriptions of property thus employed could be construed to embrace money on hand realized from the operation of these works.

But further, as indicating the evident intent of the parties, the offer made in 1869 was conditioned by the assertion on the part of the State of the fact that it was under certain obligations incurred for the repairing, preservation and operation of the canal, and that it would turn the canal over *only upon condition of its being guaranteed from loss on account of these obligations.* In this it was asserting that the proceeds from the land grant and the tolls from the canal had not yet reimbursed it for its outlay and obligations. The response of the United States did not come until eleven years later, and its reply was that it would not accept the canal and public works thereon unless in its acceptance the United States was to be left *"free from any and all debts, claims or liability of any character whatsoever."*

In other words, in 1869, the State claimed that it was a creditor of this "canal fund" that was to be made up of receipts from the sale of canal lands, canal tolls and earnings, and in which fund the Attorney General of the United States claims the United States then had and still has an equitable interest. But in 1880, Congress, in stating the conditions upon which it would accept the canal and the public works thereon, admits that the State has made the claim that it had not been reimbursed for its expenditures and obligations incurred in respect to the canal; but it refuses to acknowledge the relationship of debtor and creditor as existing between the State and the United States, and refuses to permit it to be created. That this is true cannot

be gainsaid. Congress refused to accept the canal unless the State relinquished any demand for further reimbursement. The canal was to be left *"free from any and all debts, claims, or liabilities of any character whatsoever."* This must have been intended to refer specifically to the claim made by the State in its offer to transfer the canal.

But even though the relationship of debtor and creditor had existed between the State and the United States under the terms of this grant, the balance due in 1869 and in 1880 were unstated. The demand that the State relinquish its claim would imply that in consideration thereof the United States would relinquish its claim.

A settlement of accounts between parties is *prima facie* a settlement of *all* accounts.

Bourke vs. James, 4 Mich. 336.

Or if the transaction be viewed as the substitution of a new contract, regarding the control and management of this canal for the old one made in 1852, the presumption would be that it was intended to discharge the old agreement and all obligations thereunder.

That the State of Michigan took the view that it was not under obligation to pay over to the United States as its creditor the accumulated tolls in its canal fund nor to deliver to it the personal property and paraphernalia that had been used in and about the canal, is made evident by the terms of Act No. 17, Public Acts of 1881, heretofore printed in this brief. In consonance with the offer of the United States to accept the canal and public works thereon free from debt, etc., it ordered their transferance. But in reference to the transferance of the money and material the board

of control was authorized and empowered (not authorized and directed as it was with respect to the canal and public works thereon) to make the transfer to the United States, *at any time the board may deem it proper*, subject however to this proviso or condition, namely, that "such transfer of material and payment of moneys *shall be in consideration of the construction, by the United States of a suitable dry dock to be operated in connection with the Saint Mary's Falls Ship Canal for the use of disabled vessels.*" This is far from an admission that the United States had an absolute right to have, and receive this money and material. In fact it is a substantial denial of such a right, and in the fact that the State imposes a condition, or more properly a consideration, to be forthcoming from the payee who is to receive it, it asserts that chiefest attribute of ownership, namely, the right to determine the consideration upon which money will be parted with.

II.

ADMITTING THE ALLEGATIONS IN COMPLAINANT'S BILL IT DOES NOT APPEAR THAT THE CONDITIONS RELATIVE TO THE USE AND OPERATION OF THE CANAL IMPOSED BY THE ACT OF AUGUST 26, 1852, WERE VIOLATED BY THE STATE.

First. *No breach of conditions upon which a money demand could be predicated is claimed in complainant's bill, except that the State made a profit out of the operation of the canal.*

It is true that a violation of the State's obligation is directly charged in the bill of complaint in the failure of the officers of the State to make report to the Secretary of the Interior as required in section five of the act, but no money demand is made or could be made upon that account. Otherwise, except in one particular, everything had been

satisfactory. The canal had been constructed, presumably on the location or site intended. It was operated without complaint made on the part of the United States. Government vessels in passing through the canal had undoubtedly been accorded free passage. Complaint is made however that the State charged excessive tolls and that this was apparent from the fact that there was on hand in the canal fund of the State when the canal was turned over to the federal government the admitted sum of $68,927.12.

The pleader for the government seeks to excuse the State by saying that the accumulation of this amount "was done without intention on the part of the State to make a profit from the management and control of said canal in violation of the act of Congress above quoted, but for the purpose of having cash on hand to make repairs either during the season when the canal was closed for navigation or any time when so needed."

It would almost seem that the learned assistant to the Attorney General of the United States, whose name appears upon the brief of the government, argues that the State presumptively had violated the terms of its obligation under the grant, if, when its canal was turned over to the United States, there was a single penny in its canal fund. He certainly must be held so to argue if he bases his right to recover upon a breach by the State of the obligations assumed by it upon acceptance of the grant.

The effort to controvert the assertion that the fact of this fund on hand is presumptive of the fact that the State had violated its agreement in respect to the rate of tolls to be charged, is made under the following sub-head:

Second. *A surplus of tolls upon hand to meet possible emergencies is not to be held as a violation of the limitation upon the amount of tolls that could be collected.*

Anyone conversant with the risks attendant upon the maintenance and operation of a great ship canal such as that at Sault Ste. Marie can hardly impute to the State other than reasonable prudence in keeping from $50,000 to $75,000 constantly on hand to meet emergencies.

Mighty forces were to be controlled. A leak in an embankment or a slight impact of a vessel upon the lock gates, a collision or the sinking of a vessel in the canal or locks, would result in tremendous damage; and, without the means of meeting such emergencies, the whole vessel interest engaged in the Lake Superior trade would be tied up indefinitely at a loss hardly to be expressed in ordinary figures. Such events have happened many times, and particularly since the United States took over this canal; and they have been so widely advertised as almost national disasters, due to no lack of human caution and prudence, that it is hardly necessary to call them to the attention of this court to enforce the necessity for the maintenance of a constant reserve by the State while it was charged with the maintenance of these works.

The State by the acceptance of this grant became charged with the duty and obligation of maintaining this canal efficiently and in safe and proper condition. This was the paramount consideration, and all obligations that it assumed were subordinated to this, the greatest of them all. It seems almost absurd to have to argue this proposition. By the necessities of the case the rates of toll would have to be based upon estimates both of probable expenses, and the probable number of vessel passages. At the close of navigation there would have to be money on hand to meet the expenses of repairs, refittings, etc., that had to be made during the winter months. The offer of the State to turn over the canal was made in 1869. The month or day that the United

States might accept was unknown. The claim of the government's counsel is that because, when Congress finally accepted, there was money in the canal fund, Michigan stands convicted of having violated an agreement not to charge tolls so as to make a profit out of this canal. The facts that must be well known to this court and which would occur to anyone reasonably considering the proposition presented, would seem to furnish the most complete refutation of the argument thus advanced.

Third. *A certain portion of the earnings of the canal was not subject to the conditions which related to the rate of toll that could be charged.*

This fact does not appear in complainant's bill and may not be known to its counsel. But in asserting that the sum of $68.927.12 had arisen from the imposition of excessive tolls it is presumed to be pregnant with the assertion that this amount could have arisen from no other source, or at least no other that would not imply a breach of the obligation of the State assumed by the acceptance of this grant.

But there were revenues that accrued to the State in the operation and maintenance of this canal other than tolls for the lockage of vessels. Instances such as the following may be enumerated, permitting vessels to use one of the lock chambers as a dry dock, rent of lighters, pumps, diving apparatus, etc., sale of old material, etc. The total returns for these various sources during the twenty-six years that the State operated this canal form no insignificant amount. They were uses permitted without impairment of the usefulness of the canal as a highway, for which the State was accustomed to charge such amounts as the privileges or services were reasonably worth, and which were duly accounted for and placed in the canal fund. The State was bound by no condition not to render these services or not to permit

the uses of the canal and its apparatus in the manner detailed. It was under no obligation to do or permit these things to be done gratuitously, or at a price not exceeding the cost thereof to the State.

Certainly on the grounds of a "condition broken," the United States is not entitled to such earnings as are here enumerated, and their deduction from the balance in the canal fund would substantially reduce the balance above referred to.

Fourth. *The United States by subsequently taking over and accepting the canal from the State, and particularly in the light of the several acts of offer and acceptance must be held to have waived any claims for a breach of the conditions imposed by the original grant.*

This proposition has been already stated and quite fully discussed, in considering the question of whether Congress in the act of accepting the canal from the State did not concede the indefeasible character of the State's previous title, and its ownership of such incidental benefits as arose from the operation of the canal. Hardly more need be said than that the revesting of title in the grantor would discharge the grantee from liability on account of the conditions with which his estate had been burdened. It would be presumptively an accord and satisfaction as to claims that might have been made for a breach of the conditions that might have operated in impairment of the original grantee's title.

III.

CONCEDING ARGUENDO THAT UPON ACCEPTANCE OF THE GRANT THE STATE BECAME A MERE TRUSTEE AND NOT SEIZED OF AN ESTATE IMPLYING THE VESTING OF A BENEFICIAL INTEREST IN THE GRANTEE.

First. *The United States was not named or intended as cestui que trust.*

Does counsel claim that Congress, when it made the grant of this canal right of way, created or intended to create a trust as to which the United States was the *cestui que trust?*

The State of Michigan, which presumptively would receive an indirect benefit from the construction and operation of the canal that would at least warrant it in accepting the gratuitous office of trustee, was expressly inhibited from making any profit out of its operation; and by the same token it would seem certain that Congress, which did not consider that the United States would receive sufficient benefit from the proposed improvement to itself enter upon it, did not intend to reserve to the United States any ultimate revenue therefrom. This purpose of Congress was made even more manifest, when later it agreed to take over the canal and make it free of tolls and entirely a governmental burden. At no stage was it expected that direct pecuniary benefit would accrue to either State or National governments.

The argument of the assistant to the Attorney General is that because the benefits of this canal accrued to the whole people rather than to those of any particular locality or State, that the United States government is more properly to be held entitled to have this money that has arisen from the administration of this trust, than is the State of Michigan. In other words in the uncertainty that surrounds the question of who actually is the proper *cestui que trust,*

counsel asks this court to declare the office vacant and presents the claims of his client to be nominated to the office, the absurdity of which is apparent when it is considered that the rule is that "if no *cestui que trust* is named, or so designated that he can be identified, the court cannot carry a trust into effect, however clearly it may be created in other respects."

Perry on Trusts, Fourth Edition, Sec. 95.

But let us analyze the claim that the United States comes more nearly to representing the whole of the beneficiaries of the trust than any other governmental organization.

The vessel owners whose boats used the ship canal would be the first to receive the benefits of the reduction of tolls required under the terms of the so called trust. But it is apparent that these owners added the amount of the tolls, whether large or small, to their freight charges and that these charges entered into the price of the commodities that were carried to or came from Lake Superior, and were ultimately paid in all but infinitesimal amounts by the final consumers. The latter, the chief beneficiaries of low tolls or freedom from tolls of this canal, are to be found all over the world. The copper and iron of the Upper Peninsula of Michigan and the wheat of the great northwest of the United States and no less that of Canada, pass through this gateway *into the markets of the world,* and there is no quarter of the globe but can furnish legitimate claimants to being part beneficiaries of this trust. It is hardly conceivable that this court will attempt to measure the number of beneficiaries or the extent of benefit that each of the governmental organizations of the world, might present to this

court in this candidacy for the position of *cestui que trust* which the assistant to the Atttorney General so gravely assumes is now about to take place.

Second. *But whether cestui que trust, or settlor having an interest in the execution of the trust that would entitle it to apply to a court of chancery to compel its proper enforcement the United States acknowledged the due execution of the trust and discharged the trustee by its taking over of the canal and by the declarations contained in the Act of Congress in reference thereto.*

It is apparent from what has been said that the United States cannot be held to have been intended as *cestui que trust* as to any direct pecuniary benefits that might arise from the operation of this canal. But even though not *cestui que trust* it might properly be considered to have had an interest in the execution of the trust as settlor, or founder. But a settler or founder of a trust created by grant, by his own act becomes a stranger to the trust, in the sense that he no longer has an interest in property he has aliened. It is true that, as to a certain class of corporations, the founder has a right of visitation which he may retain or may assign, but the court of chancery has nothing to do with his visitorial power. It is only as respects the administration of the corporate property that the court has any jurisdiction.

Perry on Trusts, Fourth Edition, Sec. 742.

But the United States claims the rights of a *cestui que trust,* although it was also the settlor or the creator of the trust; and the point is here made that the joint act of the *cestui que trust* the trustee and the settlor must certainly be

held to have effected a recission of the trust and a discharge of the trustee. Perry on Trusts says, "A trustee may be relieved from his office by the consent of all parties interested, without the decree of a court, even if the instrument of trust is silent upon that subject. But the transaction operates rather as an estoppel of the *cestui que trust* than as an affirmative transfer of power."

Ibid. Sec. 285.

But it is further stated, that "A conveyance by the trustee to the *cestui que trust* merges the title and determines the trust."

Ibid. Sec. 921.

The answer to this will no doubt be that although the conveyance of the canal and the public works thereon to the United States did relieve the State from the obligation of future care and maintenance, that the trust attached to the money that had been previously realized from the canal and the tools and materials on hand, and that the conveyance of the real estate would not divest the trust that had attached to this personal property.

The answer to that proposition is the one that has been previously made in controverting the claim that the relation of debtor and creditor existed as respect canal tolls or profits.

It makes no difference whether the State was debtor or trustee. By the grant it was given the right to reimburse itself for the cost of the canal and the expenses of its main-

tenance, operation and repair, and until it was so reimbursed the terms of the trust that required tolls to be kept equal to expenses did not become operative. When the State offered to turn the canal over in 1869 it asserted that it was a creditor to the canal fund and it attached as a condition of its relinquishment of the trust that it must be fully reimbursed for its expenses as trustee. The United States refused to accept the property burdened with any charges incident to the performance of the trust, and the State assented. This is the true intent of the several acts already referred to and must be accepted as a settlement of all claims that grew out of the administration and discharge of the trust.

No claim of mistake or fraud can be put forth that gives this court jurisdiction to reopen the account. Congress has made no declaration of dissatisfaction, and has passed no act imputing mistake or fraud in arriving at the agreement that must be presumed to have been intended to be consummated when this canal was turned over. It stands to all intents and purposes as *res adjudicata;* and is not subject to be reopened at the will of one of the ministerial officers of the United States.

Third. *The declarations of the legislature and officers of the State of Michigan did not create a trust, and certainly not one in which the United States would have a beneficial interest as cestui que trust.*

It is stated in the sixth paragraph of complainant's bill of complaint and quite persistently argued in complainant's brief, that even though the grant of the canal right of way was intended by Congress to be a donation to accomplish a public work for the general good of certain classes of people, and although it was in a certain sense absolute, yet, that the declarations of the Legislature of the State of Mich-

igan and certain officers thereof, particularly the State Treasurer, amounted to an acknowledgment of, or possibly even the actual creation of, a trust in favor of the United States.

We have already conceded, *arguendo*, that the State was, as respects this public work, a mere trustee entitled to have from the administration of the trust only reimbursement for the cost of administration, and have attempted to enforce the conclusion that no liability exists to respond to the money demand that has been made on behalf of the United States. It may seem to the court that counsel now takes a backward step in his argument, to here deny the fact of a trust. But while the order of treatment may not be entirely logical, this brief would not be complete unless the exact claim of the State is clearly indicated, and an explanation made of the several declarations referred to in complainant's bill of complaint.

The first reference is to the third paragraph of the preamble of Act No. 175, Laws of Michigan, 1859, wherein the following language is used:

> "Whereas such canal, having been built and accepted by the authorities of this State, is found to need repairs in order to its preservation and usefulness, *and the due performance of the trust* created by said Act of Congress and the assent of this State thereto," etc.

The second reference is to the report of the State Treasurer for the year 1883 in which he uses the following language:

> "Since my last report, the remainder of the personal property belonging to the St. Mary's Falls ship canal has been sold, making a final balance in that fund of $68,927.12. All business pertaining to the manage-

ment of the canal on the part of the State has ceased and the moneys in the fund remain in the State treasury under Act No. 17, Laws 1881, *the State acting simply as trustee.*"

The recital in Act No. 175, Laws of 1859, cannot be construed to in any wise change the legal relations created by the previous acts of Congress and the Legislature of Michigan. The recital no doubt referred to the obligations that the State had assumed and the promises that it had covenanted to perform in respect to its management and control of the canal.

The concession of the State Treasurer has even less significance. He expressly refers to Act No. 17, Laws 1881, in which the State in effect denies that the United States was *cestui que trust* as to the moneys referred to, but possibly does admit a certain sort of trust in favor of the vessel interests, at least it offers to pay the money over to the United States in consideration of the construction of a dry dock by the United States to be operated in connection with the ship canal for the use of disabled vessels. The State Treasurer is pleased to speak of the money held under these conditions as held by the State as "trustee."

It is submitted that none of these declarations in anywise change or modify the actual relations that existed by reason of the grant in question and its acceptance by the State. These acts speak for themselves and cannot be held to have been modified except by equally authoritative declarations intended to effect their modification.

IV.

THE GRANT OF THE CANAL RIGHT OF WAY CANNOT BE CONSTRUED AS A MIXED TRUST AND POWER.

Counsel for defendant is bound to concede that a certain degree of plausibility attaches to the contention of counsel for complainant that the grant of the canal right of way with attendant conditions is to be construed as a grant of property connected with the exercise of political power for public purposes, or "to accomplish a public work for the general good of all classes of people engaged or interested in the commerce of the Great Lakes of the United States" as it is expressed in complainant's bill of complaint; but the fallacy of the claim can be readily made apparent.

The right of a State legislature to create subordinate municipalities and to endow them with property or with the right to acquire property *to carry out the purposes of government* is undoubted, unless there are constitutional restrictions abridging the right; and with the right to create is also coupled the implied right to dissolve.

Dillon on Municipal Corporations uses the following language:

> "As to private corporations it can, we think, safely be affirmed that while the legislature may, under and pursuant to such reserved power, annul and dissolve them at pleasure, it is not within its competency, under the Federal Constitution as amended, or under like provisions of the constitutions of the States, to impair or affect the property or property rights of the dissolved corporation, but only *its right to exist*, and such other rights as are *directly and necessarily*

dependent on the continued existence of the corporation. The rights of mortgagees, of creditors generally, and rights acquired under valid contracts with the corporation, survive the repeal and dissolution. *And the same doctrine, doubtless, applies to property rights acquired by virtue of valid municipal grants.* * * * It is believed by the author, for the reasons suggested in this chapter, that while the legislature has full power of legitimate regulation and control, it cannot deprive them (that is, in essence, *the people* of the locality at whose expense it has been acquired or for whose benefit it was granted) of such property."

This quotation is made not so much to sustain the contention of this brief as to illustrate the theory of complainant. The latter apparently seeks to have applied to this case the rule that a governmental agency that may create subordinate or minor municipalities and bestow upon them a power to perform governmental functions, retains a beneficial interest in the exercise of the power granted, and that when the grant is one of property coupled with a power to use the property only to accomplish a public work or perform a governmental function, the grantee has no beneficial interest in the estate conveyed although the conveyance may be absolute in form. That this rule is applicable in the relationship between a State and its minor municipalities may be admitted, although the quotation above made would seem to imply a limitation upon the authority of the State upon dissolution of the municipality to take to itself all of the property or moneys acquired by the municipality in the performance of the grant that it has on hand at the time of its dissolution or the revocation of the grant.

But would the same implications arise in the relationship

to be found between independent governmental organizations having equal authority and no interdependency?

One individual may donate to another individual property to assist the latter in carrying out some purpose beneficial to himself alone and no relationship of trust or power will be implied from the grant.

The State of Michigan is a governmental organization of as high authority as is the United States itself. In many instances the powers of State and Nation are concurrent, but in most particulars each has distinctive powers and duties created and imposed by constitutional provisions, and such powers cannot be delegated one to the other.

The State of Michigan had full right and authority to construct this ship canal around the rapids of the St. Mary's River to accomplish a public work that would inure to the general good of all classes of people engaged or interested in the commerce of the Great Lakes, had it seen fit to exercise the right. Such a right inheres in its sovereignty. It needed no enabling act of Congress to give it the necessary power or authority, nor could such enabling act have given it such authority did it not already possess it.

The construction of canals that were designed in a large measure to serve public necessity and to inure to general rather than mere local welfare had up to 1852 been much more commonly done under State than under federal authority and ownership. The Erie canal of New York and many others might be enumerated. It was the exception that the United States undertook works of internal improvement. Its constitutional authority to engage therein had been very insistently disputed, and its policy had been rather to aid the States in carrying out their canal projects by land grants, than to itself assume the burdens incident to federal ownership and control. It was not until after the civil

war that a river and harbor bill so called was first passed by Congress and approved by the President, and thus a change of policy with respect to this class of internal improvements entered upon by the United States.

All these considerations demonstrate that in the grant of the canal right of way no *power* was intended to be vested in the State. The *power already existed*, and the construction of the canal was and was intended to be the exercise of the power of the State to carry out *its own* public purposes.

With this view of the case how can it be reasonably said that the rule as to the grant of property to minor municipalities to enable them to carry out the governmental functions for the granting political organization can be said to apply.

The benefits that may be derived from the exercise of public functions undoubtedly may be said to belong to the governmental organization from which the powers to be exercised primarily originate.

In the case at bar the grant of property must be taken to have been what it is stated in the title of the act to have been, viz: "a donation," and the limitations contained in the grant must be construed, not as the limitations of a "power," but as an effort to insure that *the State's purposes and designs* in respect to this improvement and its future control and operation, purposes which were agreeable to and were acquiesced in by the United States to the extent that it was willing to aid the State in carrying them out, should not be departed from.

It is here argued that, inasmuch as the power to construct this canal and devote it to public purposes existed in the State, and did not arise from any grant of power by the United States and inasmuch as the grant of property by the

United States is in form absolute and is declared to be "a donation," it follows conclusively that any incidental pecuniary benefit that might have arisen from the operation of this canal would be the exclusive and absolute property of the State, and certainly could not be legally or equitably claimed as belonging to the United States.

V.

BUT IF CONGRESS, ON THE TERMINATION OF THE SO CALLED GOVERNMENTAL AGENCY OR MIXED TRUST AND POWER, COULD HAVE MADE A CLAIM OF RIGHT TO HAVE THE SURPLUS TOLLS ACCUMULATED BY THE STATE IN CARRYING OUT SUCH AGENCY, TURNED OVER TO ITSELF, YET NOTHING SHORT OF A DECLARATORY ACT TO THAT EFFECT WOULD CREATE THE RIGHT ON THE PART OF THE DEPARTMENT OF JUSTICE TO MAKE THIS DEMAND UPON THE STATE.

It is not proposed to argue but merely to state the above proposition. The department of justice cannot create but is merely empowered to prosecute claims due to the government. No declaration has been made by Congress of a right to have these surplus moneys. Upon the repeal of a municipal charter, provision is usually made for the disposition of funds upon hand in the municipal treasury, and the State would be presumed to assert its right to have any of these moneys properly belonging to it. In this case by the concurrent acts of the State and National governments the power granted by the latter to the former (if the court finds it to have been a case of power granted) was revoked. If the United States had a legitimate right to the surplus moneys realized by the State in the exercise of this power, presumably Congress would have laid claim to it; and unless Congress has so declared it is contended that no claim can be said to exist.

VI.

THE CLAIM OF RIGHT TO HAVE AN ACCOUNTING AS TO THE SALE BY THE STATE OF THE LANDS GRANTED TO AID IN THE CONSTRUCTION OF THE CANAL.

Thus far has been considered only that part of the grant relating to the canal right of way.

It may and undoubtedly will be contended that, irrespective of the view this court may take of the right of the United States to have and receive from the State the surplus tolls admitted to have been on hand when the canal was turned over to the latter, that the failure of the State to furnish a statement of the sales of these lands granted to aid in the construction of the canal, makes an accounting under this bill inevitable.

In reference to this, defendant will call attention to one feature of complainant's bill. In the first paragraph of the bill, Act No. 38, Laws of Michigan, 1853, is set out in full, and it is apparent from such act that the legislature authorized a contract to be made for the construction of the canal in consideration of the State's vesting in the contractors the entire grant. This may only inferentially appear from this act, but that such was the course actually pursued may be stated, if it will not be deemed to be going outside the record.

But irrespective of this, the act of the legislature of 1869, in which the State offered to turn over the canal to the United States if the latter would fully reimburse it for expenses that it had been to in respect to such canal and for which it had not been fully reimbursed by the sale of lands, receipts from tolls, etc.; and the declaration of Congress in 1880 that the United States would accept the canal if the State made no further claims for reimbursement and

the canal was debt free; in the absence of fraud, duress or mistake, must be accepted as a settlement of any claim that might have been made by or on behalf of the United States in regard to the sales or disposition of these lands.

What has been already said in the discussion of the effect of these two acts as a settlement of claims that may be considered as having grown out of this grant of right of way and grant of lands to aid in the construction of this canal, applies to the proceeds from land sales more certainly than to any other feature of the account.

VII.

THE IMPUTATION OF BAD FAITH TO THE STATE OF MICHIGAN.

The *mala fide* necessarily charged against the State of Michigan in the bill of complaint that has been filed against it in this court is the diversion of these so called trust moneys from the purposes for which it is claimed they were held and the refusal of its officers to acceed to the demands of a putative *cestui que trust*.

If the arguments that have been advanced in this brief are sound, the only act of the State authorities of which complaint can really be made is the withdrawal of the State's offer to devote this money to the purpose of recompensing the United States for the construction of a dry dock in connection with the government locks at Sault Ste. Marie, Michigan, for the use of disabled vessels, or the failure of the State to devote it to some use that would be beneficial to the interests from which it was primarily collected.

No claim will be made that the United States has earned the money by compliance with the State's offer. Nor can the officers of the federal government be permitted to complaint if the State sees fit to do what it chooses with its own.

In the brief filed on behalf of complainant but one case is cited to support the government's contention, and that has been already referred to, viz.: Rice vs. Railroad Company, 1 Black. 358. If that case is authority for anything it is to the effect that the United States can revoke a grant once made, if revoked before a beneficial interest has vested in the grantee. With the authority of this case as the petard with which to silence this last complaint against the State of Michigan, it may be said that it was just as competent and proper for the State to withdraw its offer to pay over this money to the United States for uses beneficial to the marine interests of the Great Lakes, as it was for the United States to withdraw its land grant from the Territory of Minnesota. Bad faith is not to be charged in either instance.

In the light of the arguments advanced in behalf of defendant it is insisted that it is entitled to an order of this court sustaining defendant's demurrer and dismissing complainant's bill of complaint.

CHARLES A. BLAIR,
Attorney General for the State of Michigan.

HORACE M. OREN,
Solicitor and of Counsel for Defendant.

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IN THE SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1903.

UNITED STATES OF AMERICA, COMPLAINANT, vs. THE STATE OF MICHIGAN, DEFENDANT.	In Equity.	Original, No. 10.

And now comes the said defendant by its solicitor Charles A. Blair, attorney general of the state of Michigan, and respectfully asks this Court for permission to file its answer, herewith submitted, in the above entitled cause.

Dated October 3d, A. D. 1903.

Chas. A. Blair

Attorney General of Michigan,
Solicitor for Defendant.

Business address: Capitol, Lansing, Mich.

HORACE M. OREN,
HENRY E. CHASE,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1903.

THE UNITED STATES OF AMERICA, COMPLAINANT, vs. THE STATE OF MICHIGAN, DEFENDANT.	IN EQUITY. Original No. 10.

SIR—Please to take notice that on Monday, the 12th day of October, 1903, I will apply to the said Court, by motion, for permission to file an answer to the bill of complaint filed in the above entitled cause.

You are herewith served with a copy of said motion and answer.

Dated, this 3d day of October, A. D. 1903.

Chas. A. Blair

Attorney General of Michigan,
Solicitor for Defendant.

To John K. Richards,
Solicitor General.

Marsden C. Burch,
Solicitor and of Counsel, for said Complainant:

STATE OF MICHIGAN, } ss.
County of Ingham. }

Henry E. Chase, Deputy Attorney General of the State of Michigan, being first duly sworn, deposes and says, that he caused a copy of the foregoing motion and notice, together with a copy of the answer therein referred to to be served upon the said complainant, by depositing copies thereof, enclosed in a sealed envelope, with postage fully prepaid thereon, and properly addressed to John K. Richards, Solicitor General of the United States, Washington, D. C., in the United States Postoffice at Lansing, Michigan, on the 6th day of October 1903, and by depositing copies thereof enclosed in a sealed envelope, with postage fully prepaid thereon, and properly addressed to Marsden C. Burch, Washington, D. C., in the United States Postoffice at Lansing, Michigan, on the 6th day of October, 1903.

Henry E. Chase

Subscribed and sworn to before me this 6th day of October, 1903.

D. B. Hinchley

Notary Public, Barry County, Michigan,
Acting in Ingham County.

Commission expires January 26, 1906.

FILE COPY.

FILED
OCT 13 1906
JAMES H. McKENNEY,
Clerk

In the Supreme Court of the United States.

OCTOBER TERM, 1906

UNITED STATES OF AMERICA,
Complainant.

vs.

THE STATE OF MICHIGAN,
Defendant.

10 Orig.?
4 Orig'l.
O.T.1906

IN EQUITY, ORIGINAL NO. 6

ANSWER OF THE STATE OF MICHIGAN, DEFENDANT.

CHARLES A. BLAIR, ATTORNEY GENERAL OF MICHIGAN,
Solicitor for Defendant.

HORACE M. OREN,
Of Counsel.

LANSING, MICH.
ROBERT SMITH PRINTING CO., STATE PRINTERS AND BINDERS.
1906.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

UNITED STATES OF AMERICA, *Complainant.* vs. THE STATE OF MICHIGAN, *Defendant.*	In Equity. Original.

The answer of the State of Michigan, defendant, to the bill of complaint of the United States of America, complainant, made by leave of said court after the overruling of the demurrer to said bill of complaint, interposed by said defendant, respectfully shows:

FIRST.

The said defendant admits all the matters alleged in the first paragraph of complainant's bill of complaint.

SECOND.

Replying to the second paragraph of the complainant's bill of complaint the defendant admits that the lands appropriated by Congress under and by virtue of the act approved August 26, 1852, were duly selected by and certified to the State of Michigan to the full extent of the acreage enumerated in said act.

Replying to the demand that said defendant set forth an account of all and singular the lands so appropriated and in what manner and purpose the same were disposed of this defendant says: That on or after the fifth day of February, 1853, the commissioners appointed by the Governor of the State of Michigan under and in pursuance of the terms of the act of the Legislature of the State of Michigan approved February 5, 1853, which act is set forth in full in the first paragraph of complainant's bill of complaint, solicited tenders for the construction of said canal on the basis of the contractor defraying the entire cost of surveying, locating and constructing the same and the necessary traveling and other expenses of the commissioners and the salary of the engineer and assistants and the reimbursement of the State of Michigan for such advances as it had previously or should thereafter make on account thereof; that the sole consideration offered by the State to proprosed contractors was the patenting of the lands granted or to be granted as aforesaid by the United States to the State of Michigan to aid in the construction of said canal as provided in said act of Congress or such portion thereof as by tender should be offered by said proposed contractor; that the best offer received by the State of Michigan for the construction of said canal and locks was that of Joseph Fairbanks, J. W. Brooks, Erastus Corning and others associated for the purpose of entering into said contract, and that said offer was to enter into and perform said contract for the entire land grant sanctioned by said act of Congress but subject to the proviso that the taxes assessed on said lands should be remitted to the person or persons making such contract for a period of five years from the time fixed for the completion of said canal; that the authority to insert said proviso was sanctioned by the Legislature of the State of Michigan by an act, entitled "An act supplementary to an act to provide for the construction of a ship canal around the Falls of St. Marys, approved February fifth, eighteen hundred and fifty-three," which

said act was approved February 12, 1853, and is in terms as follows:

"Section 1. The people of the State of Michigan enact, That the commissioners appointed under an act to provide for the construction of a ship canal around the Falls of St. Mary's, approved February fifth, eighteen hundred and fifty-three, are hereby authorized, in case they shall find it is impracticable to let the contract for the construction of said canal, on terms which shall secure its completion according to the provisions of said act, in their discretion, to contract that any taxes to be assessed on the lands donated for that purpose, shall be remitted to the person or persons making such contract, for a period not exceeding five years from the time fixed for the completion of said canal: Provided, That when any of the said lands shall be sold by the contractors to any other persons, the same shall thereafter be subject to taxation as in other cases.

Sec. 2. For the purpose of carrying out the provisions of the foregoing section, the Auditor General is hereby required, upon satisfactory evidence that any of said lands are held by such contractors, and have not been sold by them, to receipt the amount of any such taxes assessed within the period fixed upon in such contract, and returned to his office for non-payment, and to charge the amount thereof to the general fund: Provided, That the amount so charged to the general fund may be reimbursed to the State from tolls upon said canal, in such manner as shall be provided by law, in case said amount shall not be reimbursed by the United States Government.

This act shall take effect immediately. Approved Feb. 12, 1853."

Act No. 61, Laws of Michigan, 1853, p. 86.

That thereafter and on the 5th day of April, 1853, the said commissioners having received no other or more favorable offer, entered into a contract with said Joseph Fairbanks, J. W. Brooks, Erastus Corning and their associates,

for the construction, in accordance with their said tender, of a canal and locks at Sault Ste. Marie, Michigan, on the right of way ceded to the State of Michigan by said act approved August 26, 1852, and of the full width and depth and according to the full requirements of the said act of Congress; that the said contract provided among other things that the said contractors should construct said canal and locks and should defray all expenses in connection therewith as above set forth, and that for the satisfactory completion of such work, according to their contract, they should receive from the State of Michigan its patent for the entire 750,000 acres of land appropriated as aforesaid to aid the State of Michigan in the construction of said canal and locks and that said lands should be subject to the exemption of taxation authorized by said supplemental act of the Legislature of the State of Michigan hereinbefore set forth.

That by an act of the Legislature of the State of New York, approved April 12, 1853, a corporation was created to be known as the St. Mary's Ship Canal Company, and that the said company became the assignee of said contract for the construction of said canal and locks, and after said assignment carried on and completed said contract according to the terms thereof; and that said canal and locks as thus completed were accepted by the duly authorized officers of the State of Michigan on May 21, 1855.

That thereupon and on May 25, 1855, the said 750,000 acres of land which had previous thereto been selected and certified to said State by the United States were duly patented to the said St. Mary's Ship Canal Company and thereby passed out of the ownership and control of the State of Michigan.

Defendant denies that said lands granted to the State of Michigan to aid in the construction of said canal as heretofore set forth or that any portion of the same were ever sold or disposed of by the State of Michigan other than as the consideration for the construction of said canal and locks as

above recited; it denies that any proceeds or moneys were ever received by it from the sale of said lands or any part or portion thereof or that said lands were devoted to any other purpose than as herein stated, and it denies that the complainant is entitled to any accounting with respect to the disposition of said lands other than such as is furnished by this answer.

Answering the allegation that the State of Michigan did not report to the Secretary of the Interior as required by the terms of section 5 of said act of Congress, this defendant is unable to either affirm or deny the same, from any positive knowledge based upon the records of its officers who, under the laws of said State, were charged with the carrying out of the several duties and obligations imposed by said act of Congress. It avers, however, that the records in its custody and control, showing the acts of its officers in the premises, indicate the most scrupulous intent upon their part to perform all the obligations imposed upon them by said act of Congress, and it denies that there was such a failure to make reports as is charged in said bill of complaint.

THIRD.

Said defendant admits the passage of the act of the Legislature of the State of Michigan approved February 12, 1855, referred to in the third paragraph of complainant's bill of complaint; it admits that from the completion of the said canal and locks, the same were controlled, operated and managed by the State of Michigan.

It denies that said canal and locks were wholly constructed from the appropriation of lands made by the United States heretofore referred to, but avers that said lands alone did not furnish a sufficient consideration to secure the building of said canal and locks, but that the agreement of the State of Michigan that it would rebate the taxes levied upon said lands for a period of five years after the completion of said canal, and the actual rebate thereof to the extent of some

$80,000 or thereabouts and the reimbursement by the State of the several minor municipalities that suffered by the cancellation of said taxes, formed a necessary, essential and valuable part of the consideration that secured the construction of said canal and locks; and said defendant further avers that its retention out of the tolls accruing from the operation of said canal of the amount of taxes so rebated, as hereinafter more particularly set forth, was warranted under said act of Congress.

In further denial of the allegation that said canal and locks were wholly constructed from said appropriation of land, the said defendant further answering says that in the year 1870, by reason of the determination of the Supreme Court of the State of Michigan that the right of riparian owners of land bordering the St. Mary's River extended to the thread of the stream, it became necessary for the State of Michigan to acquire certain lands bordering upon said river at the easterly entrance to said locks in order to do away with certain piers of private owners that obstructed the said easterly entrance to said locks. The lands purchased were strips of the water frontage of Private Land Claims number seventy-six and seventy-seven in the then Village of Sault Ste. Marie, Michigan, and title thereto was acquired by purchase and vested in the State of Michigan. The purchase price for the said lands was the sum of $2,560.41. Defendant admits, however, in this connection, that the said sum of money was paid out of moneys accumulated from canal tolls or the St. Mary's Canal Fund hereinafter specifically described and said fund debited therewith, and it admits that, under the decision rendered on the hearing of the demurrer interposed in this case, the State of Michigan acquired said lands subject to the trust relationship created by the act of Congress first above mentioned; but in this connection defendant avers that in 1877 the said defendant conveyed the said above described water frontage to the United States of America for the use of the latter in the construction

of the so-called Weitzel lock then under construction by the United States. Defendant avers that for this conveyance no actual consideration in money passed from the United States to the State of Michigan although the deed of conveyance recited a consideration of $2,560.41, and although the said canal fund was credited with said amount. Defendant avers that by the conveyance thus made and the said credit entry the said State of Michigan fully absolved itself from liability to further account to said complainant for the purchase of said lands out of said canal fund.

It admits that no funds belonging to the State of Michigan were ever permanently invested or involved in the control, operation and management of said canal.

It admits that said canal, during the period that the State of Michigan was in control thereof was managed, controlled, repaired and maintained from the amounts collected as tolls from vessels passing through said canal and locks; this admission, however, being subject to the following proviso which this defendant avers to be true and claims the benefit of in this its answer, viz:

Prior to the year 1859 the said canal and locks developed certain leaks and weaknesses which necessitated extensive repairs in order to insure the preservation and safe and proper use thereof. The tolls from the use of said canal having been insufficient to provide the money necessary to make such repairs, and the State of Michigan having no funds available for that purpose, the Legislature of the State of Michigan passed an act which was approved February 14, 1859, as follows:

"An act to provide for the repairing, preservation and operating of the ship canal around the Falls of St. Marys, and to perform the trust respecting the same.

Whereas, By an act of Congress approved August 26, 1852, the Congress of the United States granted to this State the right to locate a ship canal around the Falls of St. Mary, and

also seven hundred and fifty thousand acres of the public lands to aid in the construction of said canal; and,

Whereas, The said act was accepted by, and the conditions thereof made obligatory upon this State by an act approved February 5, 1853; and,

Whereas, Such canal, having been built and accepted by the authorities of this State, is found to need repairs in order to its preservation and usefulness, and the due performance of the trust created by said act of Congress, and the assent of the State thereto; therefore,

Section 1. The People of the State of Michigan enact, That the Governor and State Treasurer are hereby authorized and directed, in the name and behalf of the people of this State, to negotiate and contract for a loan or loans, not exceeding in all one hundred thousand dollars, redeemable at the pleasure of the State at any time after the expiration of twenty years from the first day of July, in the year one thousand eight hundred and fifty-nine, on the best and most favorable terms and conditions that in their judgment can be obtained, at an interest not exceeding six per centum per annum, payable half yearly, to be expended and applied solely in making, from time to time such repairs upon the locks, gates and walls thereof as the board of control created by the act entitled "An act to provide for the collection of tolls, and for the care, charge and operating of the St. Mary's Falls Ship Canal," approved February 12, 1855, may deem necessary for the preservation and efficient operation of said canal, and the full performance of the trust above recited.

Sec. 2. For the purpose of effecting the loan or loans aforesaid, the Governor and State Treasurer are hereby empowered and directed, after having first advertised for such loan in one of the daily papers in the cities of Detroit, Boston, New York and Pittsburgh, for at least thirty days prior to negotiating said loan, to cause to be made and issued, bonds in sums of not less than one thousand dollars each, to be signed by the Governor and counter-signed by the

Secretary of State and State Treasurer, with the great seal of the State affixed thereto; which said bonds shall be drawn in favor of the Auditor General, and being endorsed by him, shall become transferable and be delivered to the Governor and State Treasurer, and be transferable by them in such form as they shall decide to be redeemable as aforesaid, and to bear interest as aforesaid, payable on the first days of July and January in each year, in the city of New York or elsewhere in the United States, should the Governor and State Treasurer find it convenient and advantageous so to contract; and it is hereby further declared that it shall be deemed a sufficient execution of said power to borrow, that the Governor and State Treasurer have caused said bonds to be executed and sold: Provided, That said bonds shall be sold to the highest bidder, but shall not be sold at less than par; and the money obtained from said loan or loans shall be paid over to the State Treasurer, and shall constitute a part of the St. Mary's Falls Ship Canal Fund, to be applied and used for the above named purposes, and for no other purposes whatever; for which application of such moneys the faith of the State is hereby pledged.

Sec. 3. All the tolls and other income from the said St. Mary's Falls Ship Canal, after paying the actual and necessary expenses for the care and operating of the same, are hereby pledged and devoted to the payment of said bonds, principal and interest, as the same shall fall due, and the State hereby guarantees the payment of the principal and interest of such bonds, and each and every of them, out of such tolls and income, and pledged its faith that in default of such payment it will unconditionally pay the same without delay.

Sec. 4. All necessary contingent expenses incurred by the Governor and State Treasurer in carrying out the provisions of this act, shall be audited by the Board of State Auditors and paid out of any moneys in the treasury not otherwise

appropriated, and be charged against said canal fund: Provided, however, That the State Treasurer shall not, as a member of said Board, vote in auditing any claim under this section.

Sec. 5. The bonds, the issue of which is authorized by this act shall be numbered and registered in a book to be prepared for that purpose by the Auditor General in his office; which register shall contain the number, amount, when each bond becomes due, the rate of interest, and when and where the interest is payable; and each bond shall contain a copy of the third section of this act.

Sec. 6. This act shall take effect immediately.

Approved February 15th, 1859."

Act No. 175, Laws of Michigan 1859, p. 478.

And it further avers that by virtue of said act the bonds for the State of Michigan for the sum of $100,000 were duly issued and sold, and the proceeds thereof credited to the St. Mary's Canal Fund as hereinafter set forth, and the amount thus realized was devoted solely to the repair of said locks and the walls and gates thereof as provided in said act. But said defendant admits and avers in the same connection that said bonds and the interest thereon were fully paid out of the canal tolls subsequently collected and moneys credited to said canal fund and that the State of Michigan has and can and does make no claim on account of said bonds upon the balance in the St. Mary's Canal Fund for which this action is brought.

FOURTH.

This defendant admits that during the period of its management and control of said canal and locks certain sums of money accumulated in the treasury of the State of Michigan due to the excess of the current earnings of said canal through tolls collected and miscellaneous receipts of said canal over

the current cost of managing, operating and repairing said property and works and the payment of the principal and interest of the bonds of the State of Michigan referred to in the last preceding paragraph of this answer, the reimbursement of the state and counties thereof for taxes rebated on said canal land as hereinbefore set forth, and the payment of such further items by way of reimbursement to the State of Michigan as it was entitled to receive and retain under and by virtue of the terms of the act of Congress hereinbefore referred to making the grant of property and lands for the construction of said canal and locks.

It admits that the accumulation of this current balance was done without intention on the part of the State of Michigan to make a profit from the management and control of said canal, but avers that from the very necessities arising from the liability of said canal and locks to be injured by the incidents of navigation and the very great damage that would intervene if prompt steps were not taken to remove the cause of the injury and make immediate repairs, it was necessary to accumulate and keep on hand available for the purpose a very considerable amount of money. It avers that the sum so accumulated and held was designed to be used only for the purpose above mentioned, and that it did not arise from any intention on the part of the State of Michigan to lay as a tax for the use of said canal greater tolls than were necessary to pay all necessary expenses for the care, charge and repairs of the same.

It denies that, after the payment of the bonds and interest thereon above mentioned and such charges as the State was entitled to be reimbursed for, any tax was imposed for the use of said canal that was not reasonably necessary to provide moneys sufficient to pay the necessary expenses for the care, charge and repairs of said canal.

This defendant in reply to the demand of said bill of complaint that said defendant should set forth the rate fixed

for tolls from year to year for the use of said canal and locks states and avers as follows:

From February 12, 1855, to June 1, 1860, the tolls were fixed at four cents of enrolled measurement of vessel using canal.

From June 1, 1860 to March 30, 1871, six cents per ton.

From March 30, 1871 to July 1, 1873, four and one-half cents per ton.

From July 1, 1873 to July 15, 1875, three and one-half cents per ton.

From July 2, 1875 to close of navigation in 1878 three cents per ton.

From opening of navigation in 1879 until said canal was turned over to the United States, two and one-half cents per ton.

It further avers that upon the completion of said canal in 1855 and its opening for the lockage of vessels and the transaction of business, a superintendent was appointed in conformity with the provisions of Act No. 91 Laws of Michigan, 1855. It avers that under the provisions of said act, said superintendent was required to keep an accurate account of all tolls received from the use of said canal, and the amounts paid out for the benefit of the canal, to whom and for what purpose, and he was further required on the end of each month, or at such other time as the state treasurer should direct to pay over to said state treasurer all tolls or moneys collected over and above a sum not exceeding five hundred dollars, after paying the actual and necessary expenses for the care, repair and operating of said canal.

It further avers that the amounts thus paid over to the treasurer of the State of Michigan were required by said act to be credited to an account to be kept by said treasurer and the auditor general of the State and to be known as the "St. Mary's Falls Ship Canal Fund."

Defendant avers that from the opening of said canal until 1877 the several superintendents of said canal, and from

1877 until said canal was turned over to the United States the collector thereof, appointed under and by virtue of the provisions of Act No. 118 Public Acts of the State of Michigan of 1877, did keep accurate accounts of said tolls and the receipts and disbursements of said canal, and did deposit in the treasury of the State of Michigan from time to time as required by the Treasurer of said State the surplus money received by them severally after payment of expenses and disbursements as by said acts required, and that the moneys thus received by the said State Treasurer were credited to said canal fund.

Defendant further avers that subsequent to 1857 the financial transactions of said superintendents and collectors were published annually in the printed reports of said superintendents and collectors made to the Governor of the State of Michigan, and form a part of the printed public records of the State of Michigan and to which for greater certainty said defendant begs leave to refer.

Defendant further avers that subsequent to the turning over of said canal and locks to the United States of America in 1881 the then collector of said canal turned into the treasury of the State of Michigan all the moneys received by him from tolls and other receipts of said canal less disbursements for the expense of maintenance, operation, and repair, and also such sums as had been realized from the sale of personal property belonging to said canal, and made a final settlement with said treasurer, and that by said final settlement there was credited to said canal fund all the amounts received from said superintendents and collectors of said canal during the period of its operation by the State of Michigan and which represented the tolls and current receipts of said canal less authorized disbursements for current expenses, and also amounts received for property sold.

Defendant further avers that prior to the year 1855 there had been opened upon the books of the Treasurer and Auditor General of the State of Michigan an account denominated as

the "St. Mary's Ship Canal Fund;" that to this fund was credited the following, viz.:

First. The amounts paid into the State treasury by the several superintendents and collectors of said canal as hereinbefore set forth.

Second. The amount received from the sale of State bonds for the repair of said canal as heretofore set forth.

Third. The amount of the consideration for Private Land Claims Nos. 76 and 77 hereinbefore referred to.

Fourth. Amounts received from the sale of canal property and miscellaneous items hereinafter specifically referred to.

That said fund or account was debited with the following items, viz.:

First. Disbursements made by the State on account of said canal prior to its completion and for which the contractors who constructed said canal were not bound to reimburse the State.

Second. Amounts expended by and under the direction of the board of control of said canal in the repair and improvement thereof not included in disbursements made by the superintendent.

Third. Payments made upon the principal and interest of the bonds issued under and by virtue of the provisions of Act No. 175 Laws of Michigan, 1859, hereinbefore referred to.

Fourth. The taxes upon the 750,000 acres of land granted to aid in the construction of said canal rebated to said contractors for a period of five years, hereinbefore referred to.

Fifth. Salaries of canal officers and expenses and per diem of board of control, and such incidental and miscellaneous expenses as were not paid by the superintendent or collector of said canal.

Sixth. Advances or temporary loans made to the superintendent of said canal to enable him to pay current expense of operation.

Defendant further answering has attached to this its answer the several debit and credit items of said fund as

exhibited by the reports of the Treasurer and Auditor General of the State of Michigan in the form of a series of tabulations which are marked Exhibit A and which tabulation it prays may be considered a part of this its answer.

It avers that the said several accounts above mentioned were kept continuously until the final conversion of all the property of said canal into money as hereinafter set forth; and that said Exhibit A hereto attached is a true and accurate record of the financial transactions of the State of Michigan incident to the performance of the trust imposed upon it by said act of Congress and that the balance which is therein exhibited is the true balance representing the obligations of the State of Michigan to the United States under its trusteeship created by said act of Congress.

It admits that at the time said canal and locks were turned over to the United States by the State of Michigan there was a balance in the treasury of the State of Michigan to the credit of said fund.

It denies that the exact balance to the credit of said fund at the time said canal was turned over to the United States was the sum of $68,927.12, but admits that said sum was the balance in said fund on Sept. 30, 1883, and avers that said amount was the final balance to the credit of said fund after the sale of all the saleable property belonging to and appertaining to said canal and locks as is more particularly hereinafter set forth and that said balance remained in the treasury of the State of Michigan credited to said fund until the passage by the legislature of said State of Joint Resolution No. 20 Public Acts of 1897 hereinafter referred to.

It denies that the said sum of $68,927.12 arose solely from the collection of canal tolls but avers that it included also such moneys as were received from the sale of such personal property as belonged and appertained to said canal which was sold by the board of control of said canal prior and subsequent to the assumption of control thereof by the United States, and also such items of miscellaneous receipts as apper-

tained to said canal and locks, and all the debit and credit items hereinbefore referred to.

Defendant admits that there was a quantity of personal property appertaining and belonging to said canal on hand at and before the transfer to the United States before mentioned. In reference to the disposition of said personal property and the proceeds from the sale thereof defendant avers that subsequent to the acceptance by the State of Michigan of the terms of transfer of said canal to the United States by the act of its Legislature approved March 3, 1881, the officers of the United States to whom delivery of said canal and locks was to be made were permitted to go over the said personal property and select such thereof as they deemed to be needful in the maintenance and operation of said canal and locks after the transference to the United States, and that they did select and take a large portion of said personal property, a true list with the inventory value of which is hereto attached and made a part of this answer and marked Exhibit B; and for the property so turned over by the State of Michigan and received by the said officers of the United States, there was paid to the State of Michigan by draft on the treasury of the United States the sum of $7,922.96. Defendant avers that the sum so paid as aforesaid, by the United States to the State for the said personal property was deposited in the treasury of the State of Michigan and was credited to said "St. Mary's Canal Fund" and enters into the balance of $68,927.12. (See Exhibit A, Schedule No. 29.)

And defendant further answering says that at the time of the transfer of said above mentioned articles to the United States the only other personal property belonging to said canal and locks which had not up to that time been sold and converted into money, consisted of the items contained in the inventory or list hereto attached, marked Exhibit C, which is also made a part of this answer; that subsequently the board of control of said canal caused such of the articles

listed in said last mentioned inventory as were saleable to be sold, and there was realized therefor the sum of $1,557.84, which sum was deposited in the Treasury of the State of Michigan and credited to said "St. Mary's Canal Fund" and forms a part of the credit item of $2,084.53 appearing in Schedule 30 of Exhibit A, and is also included as a part of the balance of $68,927.12.

And defendant further avers that the only articles of personal property belonging and appertaining to said locks and canal for which the State of Michigan has been held to be accountable consisted of a list of articles nominally inventoried at the sum of $187.50, an inventory of which is hereto attached and marked Exhibit D and is hereby made a part of this answer, but said defendant avers that said articles were in fact worthless and unsaleable.

It further avers that said last mentioned articles were left in one of the warehouses of the United States appurtenant to said canal and that they have in fact remained in the care and custody of the officers of the United States in charge of the canal and locks at Sault Ste. Marie, Michigan, ever since subject to their control and disposal.

Said defendant denies that any further or larger sum of money than the $68,927.12 above mentioned accrued or was on hand or within the control of said defendant in its treasury or otherwise that might or should have been accredited to the account of said canal and locks.

FIFTH.

For as much as this honorable court in its decision on the demurrer interposed by said defendant to complainant's bill of complaint has held that the State of Michigan is liable as trustee or debtor to the United States for the admitted balance

in the treasury of the State of Michigan credited to said "St. Mary's Canal Fund," this defendant admits the allegations contained in the fifth paragraph of complainant's bill of complaint, save only the following particulars:

It denies that the terms of the act of the Legislature of the State of Michigan approved March 3, 1881, as respects the transfer of materials belonging to said canal and the payment over of the moneys remaining in said canal fund are as set forth in said bill, but avers that the exact terms of said act are as follows:

"Sec. 2. The board of control of the Sault Mary's Falls Ship Canal are hereby authorized and empowered, at any time when they may deem it proper, to transfer all material belonging to said canal, and to pay over to the United States all moneys remaining in the canal fund, excepting so much as may be necessary to put the said canal in repair for its acceptance in accordance with the act above recited: Provided, Such transfer of material and payment of moneys shall be in consideration of the construction, by the United States of a suitable dry dock, to be operated in connection with the Saint Mary's Falls Ship Canal for the use of disabled vessels."

SIXTH.

For as much as by the decision upon defendant's demurrer it is precluded from denial of the matters set forth in the sixth paragraph of complainant's bill of complaint, it admits the same.

SEVENTH.

Said defendant admits the passage of Joint Resolution No. 20 of the public acts of 1897 set forth in the seventh paragraph of complainant's bill of complaint. It admits that

demand was made upon the officers of the State of Michigan to account to the United States in the premises, but avers that said demand was not made until the fifth day of December, 1901, as appear by certified copies of the letter of demand attached to this answer and marked Exhibit E, and which is made a part of this answer.

EIGHTH.

Said defendant, answering the eighth paragraph of complainant's bill of complaint admits its liability under the act of Congress above mentioned to make the annual reports of its doings in the premises to the Secretary of the Interior.

For as much as its liability has been established by the judgment on the demurrer above mentioned, it admits its liability to pay over to the United States all funds on hand or within its control in connection with said trust and to account for or surrender to the United States the property, implements, etc., belonging to said canal.

It admits the right of the United States to have an accounting as to the premises within the limitations set by this honorable court in its opinion rendered in overruling the demurrer.

But it avers that in this its answer it has rendered a just, true, certain, specific and complete statement of its doings in and about the disposition of the lands appropriated by said act of Congress to aid in the construction of said canal, and that as respects said lands the complainant is entitled to no further or other relief than is afforded by this answer.

It further avers that in this its answer it has rendered a just, true, certain, specific and complete account to the extent required by said opinion overruling said demurrer of the moneys received from the operation and control of said canal and locks, the disposition of the personal property, tools,

implements, accouterments of said locks and canal and the money realized from the sale thereof, and of the true balance in said canal fund which under said opinion it is liable to pay over to the United States, and it claims and avers that by so doing and consenting as it hereby does that a decree be entered in this cause against it, the State of Michigan, and in favor of the United States of America for the sum of $68,927.12, the said complainant will receive all the relief to which it is entitled under its bill of complaint.

Said defendant further answering denies that it is chargeable with or should be held for interest upon the amount so as aforesaid admitted as its liability to the United States in the premises. While under the decision of this Court upon the demurrer interposed by defendant, it is bound to admit its trusteeship as to the moneys in its treasury from time to time credited to the St. Mary's Falls Ship Canal Fund and its indebtedness to the United States for the final balance herein admitted, yet it avers that the act of Congress under which its trusteeship initiated negatived the implication that it was its duty to invest the moneys that should come into its possession in its fiduciary capacity or that it should do anything else than safely keep such moneys and pay them over to the United States of America upon demand. While it admits that under the laws of the State of Michigan, and particularly under Act No. 105 of the Laws of Michigan of 1855 the Treasurer of the State of Michigan was authorized under certain conditions to deposit the surplus funds belonging to the State in banks and to require interest on said deposits to be paid to the State, and while it admits that since the passage of said act it has been the practice of the State Treasurers to deposit the surplus funds of the State, except such as were needed to meet current demands in the banks designated by said Treasurers and furnishing the security required by said act, and while the State has received from said banks from time to time interest upon said deposits aggregating very considerable amounts, yet defendant avers that there has

never been any attempt nor was it possible to apportion among the various funds that from day to day entered into the treasurer's balance their proportionate share of the interest received from the deposit of said surplus fund. Defendant avers that the cash on hand in the treasury uninvested varied from day to day, that the balances in the several funds were subject to change and were constantly changing, and that it would have been and was practically impossible to assign to each of the funds that made up the daily treasury balance their due and equitable proportion of interest accruing through the deposit of the surplus revenues of the State in interest paying banks.

It avers that the rate of interest paid by said banks was much less than the legal rate of interest, and ranged from two to three per cent upon daily balances.

Defendant avers that it was the custom of the Auditor General and Treasurer of the State to credit amounts thus received by way of interest as above set forth to the general fund of the State, and to no other fund. Defendant avers that it would be utterly impossible to determine the amount or any fair approximation of the amount of the interest which the State of Michigan realized from the moneys that have since 1858 represented the credit balance in the St. Mary's Falls Ship Canal Fund. It denies that it was any breach of the terms of its trust to allow the moneys of this fund to be mingled with the funds that may be properly denominated as funds of the State. It avers that it was undoubtedly intended by said act of Congress that the moneys arising from the execution of said trust should go into the treasury of the State on the same terms and conditions as other moneys of the State, save only that the State should be accountable to the United States for the amounts received through the execution of said trust. It avers that the deposit of surplus moneys of the State in depository banks had no relation to its duties as trustee for the United States under said act of Congress, and that, unless a duty to invest these funds existed as an

express or implied obligation of its trusteeship, the United States of America can claim no benefit therefrom. It further avers that its delay in paying over to the United States the balance in said canal fund after said canal was turned over to the United States and the canal property was converted into money, and its subsequent transfer of said balance to the general fund of the State, cannot and should not be held to give to the United States of America any greater rights than were contemplated as a condition of said trust, viz.: that the State should pay over to the United States on demand the balance credited to said fund which had arisen from the excess of receipts over disbursements incident to the State's construction, operation, and maintenance of said canal and nothing more; that until demand was made and refused no breach of the terms of its trusteeship can be imputed to the State of Michigan; that said refusal was made in obvious good faith upon the supposition that the State of Michigan had a right to attach as a condition of turning this balance over to the United States, the use of the same by the United States for the construction of a dry dock for the use of disabled vessels at Sault Ste. Marie, and upon the further supposition based upon the delay of the United States in making demand or accepting the condition imposed by the State, that the United States had relinquished its claim to said balance. Defendant avers that under said facts and circumstances interest as compensatory damages for the delay on the part of the State in turning over said balances to the United States or as resultant from its duties as trustee cannot and should not be charged against it. It denies that it, as a sovereign State, is liable to pay interest upon its debts or liabilities unless it has agreed or consented so to do and it also denies that in equity or good conscience under the facts disclosed in complainant's bill of complaint and this defendant's answer, it should be held chargeable with interest as claimed and demanded in complainant's bill of complaint.

Wherefore in consideration of the premises and the account

thus rendered in this answer and defendant's admission of liability to the amount of $68,927.12 said defendant prays the judgment of this honorable court whether further accounting shall be rendered, and whether final decree shall not be entered in favor of the United States of America as complainant and against the State of Michigan as defendant for the before mentioned sum of $68,927.12 and defendant will ever pray, etc.

Chas A. Blair

Attorney General of the State of Michigan,
Solicitor for Defendant.

HORACE M. OREN,
Of Counsel.

EXHIBIT A.

Tabulations taken from the annual reports of the State Treasurer and Auditor General of the State of Michigan showing the debit and credit items of the "St. Marys Falls Ship Canal Fund."

1.

From Auditor General's report for 1853, page 11.

Sault Ste. Marie canal fund.

	Dr.	Cr.
Nov. 30—To warrants paid during fiscal year...	$1,071 92	
By balance, November 30, 1853.....	.....	$1,071 92
Total.....	$1,071 92	$1,071 92

2.

From State Treasurer's report for 1854, page 7.

Ledger balances, November 30 1854.

	Dr.	Cr.
Sault Ste. Marie canal fund.....	$1,071 92	

3.

From Auditor General's report for 1855, pages 3 and 22.

Sault Ste. Marie canal fund.

	Dr.	Cr.
To balance, Nov. 30, 1854	$1,071 92	
amount expended	702 80	
By balance, Nov. 30, 1885		$1,774 72
Total	$1,774 72	$1,774 72

4.

From Auditor General's report for 1856, page 22.

Ledger balances on Auditor General's books, November 30, 1856.

	Dr.	Cr.
St. Mary's Falls ship canal fund	$1,774 72	

5.

From Auditor General's report for 1857, page 17.

Ledger balances November 30, 1857.

	Dr.	Cr.
Sault Ste. Marie canal fund	$1,774 72	

6.

From Auditor General's report for 1858, pages 16 and 17.

St. Mary's canal fund.

	Dr.	Cr.
To balance, Nov. 30, 1857	$1,774 72	
By receipts during fiscal year		$8,947 42
To balance, Nov. 30, 1858	7,172 70	
Total	$8,947 42	$8,947 42

7.

From Auditor General's report for 1859, page 9.

Sault Ste. Marie canal fund.

	Dr.	Cr.
By balance, Dec. 1858		$7,172 70
amount received from superintendent on account of tolls collected, act 91, 1855		3,141 36
amount received from sale of canal bonds, act 175, 1859		100,000 00
amount received for premium on canal bonds		3,112 50
To amount expended for improvement on the ship canal under act 175, 1859	$35,324 74	
credit balance, Nov. 30, 1859	78,101 82	
Total	$113,426 56	$113,426 56

8.

From Auditor General's report for 1860, page 29.

	Dr.	Cr.
By balance, Dec. 1, 1859		$78,101 82
amount received from superintendent on account of tolls collected, act 91, 1855		22,955 56
To paid interest on canal bonds	$4,830 00	
amount expended for improvements on the ship canal under act 175, 1859	28,381 26	
By balance, Nov. 30, 1860	67,846 12	
Total	$101,057 38	$101,057 38

9.

From Auditor General's report for 1861, pages 16 and 17.

	Dr.	Cr.
By balance, Nov. 30, 1860	$67,846 12	
receipts during the fiscal year	10,136 67	
To warrants paid during the fiscal year		$36,607 72
balance, Nov. 30, 1861		41,375 07
Total	$77,982 79	$77,982 79

9.

From Auditor General's report for 1861, page 9.

	Dr.	Cr.
By balance, Nov. 30, 1860		$67,846 12
receipts during the fiscal year		10,136 67
To warrants paid during the fiscal year	$36,607 72	
balance, Nov. 30, 1861	41,375 07	
Total	$77,982 79	$77,982 79

10.

From Auditor General's report for 1862, page 17.

Sault Ste. Marie canal fund.

	Dr.	Cr.
By balance, Dec. 1, 1861	.....	$41,375 07
amount received from the superintendent of the ship canal, on account of tolls collected	.....	15,000 38
To paid interest on "Canal Bonds"	$6,750 00	
paid sundry contingent expenses	25 18	
balance, Nov. 30, 1862	49,600 27	
Total	$56,375 45	$56,375 45

11.

From Auditor General's report for 1863, page 14.

	Dr.	Cr.
By balance Dec. 1, 1862	.....	$49,600 27
amount received from canal superintendent on account of tolls collected	.....	19,955 22
To paid interest on canal bonds	$5,910 00	
sundry contingent expenses	150 20	
amount transferred to general fund under J. R. No. 2, 1863 (canal land taxes)	8,120 00	
balance Nov. 30, 1863	55,375 29	
Total	$69,555 49	$69,555 49

12.

From Auditor General's report for 1864, page 21.

Sault Ste. Marie canal fund.

	Dr	Cr.
By balance, Dec. 1, 1863	.....	$55,375 29
amount received from canal superintendent on account of tolls collected	.....	15,144 00
To paid interest on canal bonds	$6,000 00	
this amount transferred to general fund under J. R. No. 2. 1863 (canal land taxes)	14,455 22	
balance, Nov. 30, 1864	50,064 07	
Total	$70,519 29	$70,519 29

13.

From Auditor General's report for 1865, page 17.

Sault Ste Marie canal fund.

	Dr.	Cr.
By balance, Dec. 1, 1864	.....	$50,064 07
amount received from canal superintendent on account of tolls collected	.....	16,374 71
To paid interest on canal bonds	$6,090 00	
paid salary of superintendent and incidental expenses	1,456 10	
this amount transferred to general fund under J. R. No. 2, 1863 (canal land taxes)	8,644 00	
balance, Nov. 30, 1865	50,248 68	
Total	$66,438 78	$66,438 78

14.

From Auditor General's report for 1866, page 29.

Sault Ste. Marie canal fund.

	Dr.	Cr.
By balance, Dec. 1, 1865		$50,248 68
amount received from canal superintendent on account of tolls collected		14,184 60
To paid interest on canal bonds	$6,000 00	
paid salary of superintendent and incidental expenses	1,520 00	
this amount transferred to general fund under J. R. No. 2, 1863 (canal land taxes)	9,118 61	
balance, Nov. 30, 1866	47,794 67	
Total	$64,433 28	$64,433 28

15.

From Auditor General's report for 1867, pages 22 and 23.

Sault Ste. Marie Falls ship canal fund.

	Dr.	Cr.
By balance, Nov. 30, 1866		$47,794 67
cash received on account of tolls		18,905 61
To paid interest on canal loan bonds	$5,940 00	
paid salary of superintendent (11 months)	1,375 00	
amount transferred to general fund under J. R. No. 2, 1863	7,239 60	
balance, Nov. 30, 1867	52,145 68	
Total	$66,700 28	$66,700 28

16.

From Auditor General's report for 1868, pages 6 and 7.

St. Mary's Falls ship canal fund.

	Dr.	Cr.
By balance, Nov. 30, 1867		$52,145 68
cash received on account of tolls		13,959 67
discount on canal bonds purchased and retired		490 00
To paid interest on canal loan bonds	$6,000 00	
salary of superintendent	1,500 00	
amount transferred to general fund, under J. R. No. 2, 1863	10,830 61	
paid canal bonds	14,000 00	
paid expenses of canal board	267 52	
paid advertisement of rate of toll	7 00	
balance, Nov. 30, 1868	33,990 22	
Total	$66,595 35	$66,595 35

17.

From Auditor General's report for 1869, pages 8 and 9.

	Dr.	Cr.
By balance, Nov. 30, 1868		$33,990 22
cash received on account of tolls		12,396 50
discount on canal bonds purchased and retired		43 00
To paid interest on canal loan bonds	$5,190 00	
paid salary of superintendent	1,125 00	
amount transferred to general fund, under J. R. No. 2, 1863	6,605 15	
paid canal bonds	2,000 00	
expenses of canal board	837 60	
costs of suit	166 37	
dredging	1,099 81	
balance, Nov. 30, 1869	29,405 79	
Total	$46,429 72	$46,429 72

18.

From Auditor General's report, 1870, pages 8 and 9.

St. Mary's Falls ship canal fund.

	Dr.	Cr.
By balance, Nov. 30, 1869		$29,405 79
cash received on account of tolls		25,304 47
To paid interest on canal loan bonds	$4,990 00	
salary of superintendent	1,500 00	
amount transferred to general fund, under J. R. No. 2, 1863	4,067 72	
purchase of private claims No. 76 and 77	2,500 00	
paid canal bonds	1,000 00	
expenses of canal board	312 00	
gold premium—on interest	331 64	
advertising	38 30	
balance, Nov. 30, 1870	39,970 60	
Total	$54,710 26	$54,710 26

19.

From Auditor General's report, 1871, pages 12 and 13.

St. Mary's Falls ship canal fund.

	Dr.	Cr.
By balance, Nov. 30, 1870		$39,970 60
cash received on account of tolls		19,467 21
To expenses of canal board	$474 60	
paid interest on canal loan bonds	4,860 00	
salary of superintendent	1,125 00	
amount transferred to general fund, under J. R. No. 2, 1863	10,322 23	
gold premium—on interest	266 28	
advertising	38 18	
paid canal bonds	2,000 00	
balance, Sept. 30, 1871	40,351 52	
Total	$59,437 81	$59,437 81

20.

From Auditor General's report, 1872, pages 10 and 11.

St. Mary's Falls ship canal fund.

	Dr.	Cr.
By balance, Sept. 30, 1871	.....	$40,351 52
cash received on account of tolls	.....	30,923 30
To salary of superintendent	$1,500 00	
paid interest on canal loan bonds	4,890 00	
expenses of canal board	129 20	
printing and advertising	30 63	
maps and documents	25 00	
expenses in Brown case	45 00	
balance, Sept. 30, 1872	64,654 99	
Total	$71,274 82	$71,274 82

21.

From Auditor General's report, 1873, page 13.

St. Mary's Falls ship canal fund.

	Dr.	Cr.
To salary of superintendent	$1,500 00	
paid canal bonds	8,000 00	
paid interest on canal bonds	4,570 00	
expenses of canal board	125 95	
printing and advertising	11 85	
By balance, Sept. 30, 1872	.....	$64,654 99
cash received on account of tolls	.....	29,271 85
To balance	79,719 04	.....
Total	$93,926 84	$93,926 84

22.

From Auditor General's report, 1874, page 23.

St. Mary's Falls ship canal fund.

	Dr.	Cr.
To paid salary of superintendent	$1,750 00	
paid canal bonds	12,000 00	
paid interest on canal bonds	4,199 90	
paid for repairs, etc., on canal	1,012 00	
paid for dredging	2,235 00	
paid expenses of canal board	235 80	
paid for printing	4 25	
By cash received on account of tolls		$27,333 77
	$21,436 95	$27,333 77
By balance, Sept. 30, 1873		79,719 04
To balance, Sept. 30, 1874	85,615 86	
Total	$107,052 81	$107,052 81

23.

From Auditor General's report, 1875, page 27.

St. Mary's Falls ship canal fund.

		Dr.	Cr.
To paid salary of superintendent		$1,500 00	
paid canal bonds (purchased)	$15,000 00		
paid interest on canal bonds	3,376 63		
paid premium on canal bonds	600 00		
		18,976 62	
paid for repairs, etc		2,733 20	
paid for dredging		13,886 25	
paid expenses of canal board		235 80	
paid for printing and advertising		11 25	
New Lock Gates:			
To paid for estimate	$15 00		
paid for drawings	12 00		
paid for construction,	7,950 00		
paid for construction, extra	56 96		
		8,033 96	
By cash received on account of tolls			$18,850 00
		$45,377 09	$18,850 00
By balance, Sept. 30, 1874			85,615 86
To balance, Sept. 30, 1875		59,088 77	
Total		$104,465 86	$104,465 86

24.

From Auditor General's report, 1876, page 27.

St. Mary's Falls ship canal.

		Dr.	Cr.
To paid salary of superintendent		$1,625 00	
paid interest on canal bonds		2,760 00	
paid for repairs, etc		6,316 99	
paid for dredging		4,544 20	
paid expenses of canal board		78 60	
paid for coal for pumping out locks		2,213 66	
New Lock Gates:			
To paid for transportation of lock gates	$1,140 00		
paid for inspection of construction of lock gates	65 00		
paid for advertising for bids for lock gates	18 90		
paid expenses to Gibraltar, to perfect contract	24 40		
		1,248 30	
Expenses of Investigation:			
To paid for examination of accounts	$40 20		
paid expenses of board	163 20		
paid for examination as to Covell theft	155 11		
		358 51	
By cash received on account of tolls			$14,668 03
		$19,145 26	$14,668 03
By balance, Sept. 30, 1875			59,088 77
To balance, Sept. 30, 1876		54,611 54	
Total		$73,756 80	$73,756 80

25.

From Auditor General's report, 1877, page 77.

St. Mary's Falls ship canal fund.

		Dr.	Cr.
To paid salary of superintendent....	$1,344 34		
paid salary of collector of tolls...	335 47		
		$1,679 81	
paid for books for canal office.....		34 64	
paid for interest on canal bonds.....		2,610 00	
paid for repairs.....		1,257 00	
paid for pumping out locks.....		1,805 03	
paid for expenses of canal board.....		78 60	
New Lock Gates:			
To paid for plans.....	$50 00		
paid for advertising for bids....	9 00		
paid for construction.....	6,200 00		
paid superintendent of construction.....	28 50		
paid for inspection.....	138 63		
		6,426 93	
Expense of prosecuting Covell, supposed defaulter:			
To expense of board.....	$99 60		
counsel fees and expenses.....	349 50		
stenographer	15 00		
		464 10	
By cash received on account of tolls.....		.....	$21,910 94
cash received from sale of land to United States.....		.....	2,560 41
cash received from sale of old iron.....		.....	273 03
		$14,356 11	$24,744 38
By balance, Sept. 30, 1876.....		.....	54,611 54
To balance, Sept. 29, 1877.....		64,999 81	
Total.....		$79,355 92	$79,355 92

26.

From Auditor General's report, 1878, page 23.

St. Mary's Falls ship canal fund.

		Dr.	Cr.
To paid salary of superintendent and collector.		$2,925 02	
paid expenses to Detroit to procure safe	$17 75		
paid for new safe for canal office	200 00		
		217 75	
paid for interest on canal bonds		2,910 00	
paid for current expenses		1,000 00	
paid for expenses of canal board		317 40	
New Lock Gates:			
To paid for castings	$19 50		
paid for advertising for bids	4 20		
paid for printing notices	75		
paid for construction	3,758 00		
		3,782 45	
Expense of prosecuting Covell, supposed defaulter:			
To paid costs and expenses in suit	$111 20		
paid counsel fees	125 00		
		236 20	
By cash received on account of tolls			$20,921 13
		$11,388 82	$20,921 13
By balance, Sept. 29, 1877			64,999 81
To balance, Sept. 30, 1878		74,532 12	
Total		$85,920 94	$85,920 94

27.

From Auditor General's report, 1879, page 23.

St. Mary's Falls ship canal fund.

	Dr.	Cr.
To paid salary of superintendent and collector.	$3,025 00	
paid canal bonds	38,000 00	
paid interest on canal bonds	2,610 00	
paid expenses of canal board	332 85	
paid for telegraphing	2 73	
By cash received on account of tolls		$21,000 00
	$45,970 58	$21,000 00
By balance, Sept. 30, 1878		74,532 12
To balance, Sept. 30, 1879	49,561 54	
Total	$95,532 12	$95,532 12

28.

From Auditor General's report, 1880.

St. Mary's Falls ship canal fund.

		Dr.	Cr.
To paid salaries of superintendent and collector		$3,000 00	
paid canal bonds		8,000 00	
paid interest on canal bonds		150 00	
paid for current expenses		2,000 00	
paid per diem expenses of canal board		531 01	
paid for submarine armor		500 00	
amounts expended for repairing locks:			
For stone	$5,968 10		
" superintending stonecutting	56 85		
" inspecting stone	45 60		
" architect and engineer	126 22		
" telegraphing	19 01		
		6,215 78	
By cash received on account of tolls			$19,500 00
		$20,396 79	$19,500 00
By balance, Sept. 30, 1879			49,561 54
To balance, Sept. 30, 1880		48,664 75	
Total		$69,061 54	$69,061 54

29.

From Auditor General's report, 1881.

St. Mary's Falls ship canal fund.

	Dr.	Cr.
To paid salaries of superintendent and collector	$2,250 00	
paid for repairs	3,989 31	
paid for sail-boat lost	55 00	
paid for telegraphing	16 85	
paid per diem and expenses of canal board	932 93	
By cash received on account of tolls		$17,500 00
cash received for office furniture, tools, material, etc., sold U. S.		7,922 96
	$7,244 09	$25,422 96
By balance, Sept. 30, 1880		48,664 75
To balance, Sept. 30, 1881	66,843 62	
Total	$74,087 71	$74,087 71

30.

From Auditor General's report, 1882.

St. Mary's Falls ship canal fund.

	Dr.	Cr.
To amount paid for freight	$4 03	
By cash of Wm. Chandler, collector of tolls—		
balance in his hands		$2,084 53
balance, Sept. 30, 1881		66,843 62
To balance, Sept. 30, 1882	68,924 12	
Total	$68,928 15	$68,928 15

31.

From Auditor General's report, 1883.

St. Mary's Falls ship canal fund.

	Dr.	Cr.
By cash of Wm. Chandler, late collector of tolls, on account of an error in the amount turned into the State treasury, Dec. 20, 1881, to balance his account		$3 00
balance, Sept. 30, 1882		68,924 12
To balance, Sept. 29, 1883	$68,927 12	
Total	$68,927 12	$68,927 12

EXHIBIT B.

July 27, 1881.

The following is an invoice of property transferred to the United States from the State of Michigan July 20, 1881:

1 Grindstone	$5 00
2 box stoves	10 00
2 sets large purchase blocks	32 00
1 scow	150 00
1488 barrels of cement	4,538 40
1 dam cover, piece canvas	244 00
8654 feet square timber	778 86
2 booms gates	40 00
2 heavy oak timbers for mitre-sills	85 00
2 beacon lights	34 00
8 office lamps	12 00
2 base burner stoves in office	20 00
1 calendar clock	7 00
5 desks	75 00
16 chairs	35 00
1 safe	200 00
1 copying press	10 00
1 barometer	15 00
3 spittoons	1 50
8 curtains and fixtures	4 00
1 capstan	50 00
180 feet wire rope	24 00
1 office table	5 00
4582 feet pine timber	458 20
3000 yards clay	900 00
2250 pounds drift bolts	56 25
2 coal hods	2 00

1 oil tank	$10 00
4 jack screws	40 00
2 oilers	50
1 stone rake	2 00
1 dredging kettle	3 00
2 sounding poles	4 00
5 steel wrenches	10 00
2¼ doz. lamp chimneys	4 50
1 sprinkler	50
1 marine glass	1 00
1 flag	5 00
1 ice cooler and stand	2 00
1 bench vice	1 00
5 oak rollers	4 00
1 lamp filler	25
1 1-10 gal. oil can	2 00
½ gal. oil can	75
3 ink stands	1 75
3 hand lanterns	1 50
1 office lamp	4 00
1320 ft. C. M. oak timber	44 00
Total	$7,933 96

"EXHIBIT C."

The following is an invoice of property yet remaining undisposed of at the Sault Ste. Marie Canal July 21, 1881:

2 machinists hammers.....	$2 00
4 cold chisels.....	1 00
3 cant hooks.....	6 00
1 sledge	1 00
8 picks	3 00
4 crow bars.....	6 00
1 shackle bar.....	2 00
2 sets match tackle blocks.....	10 00
1 yawl boat.....	15 00
5 oars	2 50
1 small boat.....	5 00
2 cross cut saws.....	4 00
1 steam pump (sold, see p. 128).	1,500 00
1 coil new rope, wt. 170 lbs., @ 13 cents.....	22 10
2 derricks	80 00
1 horse	100 00
1 single harness.....	7 00
10 shovels	10 00
1 fork, curry comb and brush....	1 00
1 wagon	20 00
2 sleighs	20 00
1 cart and harness.....	15 00
2 wagon boxes.....	
3 base burner stoves in residence.	30 00
4 axes	4 00
1 letter press and stand.....	5 00
3 thermometers	
1 hoisting apparatus (doubtful)	
Total	$1,873 60

"EXHIBIT D."

List of property belonging to St. Mary's Falls Ship Canal not sold by the board of control of said canal, for the reason that it was unsaleable and worthless, but left in United States warehouse at Sault Ste. Marie, Michigan, under the control of officers of United States in charge of U. S. Ship Canal.

2	machinists hammers.....	$2 00
4	cold chisels.....	1 00
3	cant hooks.....	6 00
1	sledge	1 00
4	picks	3 00
4	crow bars	6 00
1	shackle bar.....	2 00
	lot old iron.....	
5	oars	12 50
1	small boat.....	5 00
2	cross cut saws.....	4 00
	wheelbarrow	
2	derricks	100 00
10	shovels	10 00
1	fork, curry comb and brush....	1 00
2	sleighs	20 00
2	wagon boxes.....	
1	stove	10 00
4	axes	4 00
3	thermometers	
1	hoisting apparatus.....	
	Total	$187 50

"EXHIBIT E."

Department of Justice,
Washington, D. C., December 5, 1901.

Board of Control of St. Mary's Falls Ship Canal, Lansing, Michigan.

Gentlemen—In behalf of the United States I have the honor to request that the State of Michigan acount to the United States, at once, for all funds in its hands as trustee for the United States, in the construction, control and operation of the St. Mary's Falls Ship Canal, as well as for all property belonging to the United States, but remaining in the hands or under the control of the State of Michigan, as such trustee, at the time when said canal was returned to the United States.

Respectfully,
P. C. KNOX,
Attorney General.

4 Orig 1.

O. T. 1906

Supreme Court of the United States.

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No. N, Original.—October Term, 1902.

The United States of America, Complainant,
vs.
The State of Michigan, Defendant. } In equity.

[June 1, 1903.]

The United States, by leave of court, duly filed in this court its original bill in equity against the State of Michigan, to which bill the defendant has filed a demurrer substantially for want of equity, and also because it appears therefrom that the complainant has been guilty of gross laches in regard to the matters therein set forth. It will be most convenient to set forth the bill with the exception of some portions thereof which do not seem to be material, and it is as follows:

"*To the Chief Justice and the Associate Justices of the Supreme Court of the United States, in equity:*

Philander C. Knox, Attorney General of the United States of America, for and in behalf of said United States, brings this bill of complaint against the State of Michigan, and thereupon your orator complains and says:

First.

"That the said State of Michigan, for some years previous to the date first hereinafter mentioned, was desirous of procuring the construction of a canal and lock in the Saint Marys River, at or near Saint Marys Falls, where Lake Superior empties into said river, and did at various times, by joint resolutions of the legislature thereof, importune the Congress of the United States to construct such a canal and lock on the Michigan side of said river, and was able, through the influence of its Senators and Representatives in Congress from said State, with the co-operation and influence of other States which might become directly affected in a desirable manner, to cause and procure said Congress to pass a law, which became operative on the 26th day of August, 1852, appropriating to the State of Michigan 750,000 acres of land, to be afterwards selected, to construct such ship canal and lock. Said act is in terms as follows:

'*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there be, and is hereby, granted to said State the right of locating a canal through the public lands known as the military reservation at the Falls at Saint Marys River in said State, and that four hundred feet of land in width, extending along the line of such canal be, and the same is hereby, granted, to be used by said State, or under the authority thereof, for the construction and convenience of such canal, and the appurtenances

thereto and the use thereof is hereby vested in said State forever for the purposes aforesaid and no other: *Provided*, That in locating the line of said canal through said military reservation the same shall be located on the line of the survey heretofore made for that purpose, or such other route between the waters above and below said falls, as, under the approval of the Secretary of War, may be selected: *And provided further*, That said canal shall be at least one hundred feet wide, with a depth of water twelve feet, and the locks shall be at least two hundred and fifty feet long and sixty feet wide.

'SEC. 2. *And be it further enacted*, That there be, and hereby is, granted to the said State of Michigan, for the purpose of aiding said State in constructing and completing said canal, seven hundred and fifty thousand acres of public lands, to be selected in subdivisions, agreeably to the United States surveys, by an agent or agents to be appointed by the governor of said State, subject to the approval of the Secretary of the Interior, from any land within said State subject to private entry.

'SEC. 3. *And be it further enacted*, That the said lands hereby granted shall be subject to the disposal of the legislature of said State for the purposes aforesaid and no other; and the said canal shall be and remain a public highway for the use of the Government of the United States, free from toll or other charge upon the vessels of said Government engaged in the public service, or upon vessels employed by said Government in the transportation of any property or troops of the United States.

'SEC. 4. *And be it further enacted*, That if the said canal shall not be commenced within three and completed within ten years, the said State of Michigan shall be bound to pay to the United States the amount which may be received upon the sale of any part of said lands by said State, not less than one dollar and twenty-five cents per acre, the title to the purchasers under said State remaining valid.

'SEC. 5. *And be it further enacted*, That the legislature of said State shall cause to be kept an accurate account of the sales and net proceeds of the lands hereby granted and of all expenditures in the construction, repairs and operating of said canal and of the earnings thereof, and shall return a statement of the same annually to the Secretary of the Interior; and whenever said State shall be fully reimbursed for all advances made for the construction, repairs and operating of said canal, with legal interest on all advances, until the reimbursement of the same, or upon payment by the United States of any balance of such advances over such receipts from said lands and canal, with such interest, the said State shall be allowed to tax for the use of said canal only such tolls as shall be sufficient to pay all necessary expenses for the care, charge and repairs of the same.

'SEC. 6. *And be it further enacted*, That before it shall be competent for said State to dispose of any of the lands to be selected as aforesaid, the route of said canal shall be established as aforesaid, and a plat or plats thereof shall be filed in the office of the War Department, and a duplicate thereof in the office of the Commissioner of the General Land Office.

'Approved, August 26, 1852.'

"And your orator further shows that the legislature of the State of Michigan afterwards passed an act providing for the construction of a ship canal around the Falls of Saint Mary, the same being number thirty-eight of the session laws of the State of Michigan for the year 1853. By this act the appropriation of land made by Congress as aforesaid was accepted, with all conditions therein expressed attached, and made obligatory upon the State of Michigan. By its said act, also, the governor was authorized to appoint a board of five commissioners and an engineer for the purpose of looking after the construction of said canal and lock; provisions were made relative to the contract proposed to be entered into for the construction of the canal; the expenses of surveying, locating and constructing the same; the manner in which the expenses attendant upon such construction should be paid, which was substantially out of the lands so appropriated by Congress; the keeping of accounts connected with such construction; the turning out of lands to the contractor and subcontractor, and other matters connected with such work, such act being in terms as follows:

'SECTION 1. *The People of the State of Michigan enact*, That the act of Congress entitled "An act granting to the State of Michigan the right of way and a donation of public land for the construction of a ship canal around the Falls of Saint Mary, in said State," approved August 26, 1852, is hereby accepted, and all conditions expressed in said act are hereby agreed to and made obligatory upon the State of Michigan.

'SEC. 2. For the purpose of carrying out the objects of said act the governor is hereby authorized, by and with the advice and consent of the senate, to appoint five commissioners and an engineer, who shall prepare a plan for the construction of said canal in conformity with the provisions of said act of Congress and this act, to be approved by the governor, and who shall have the entire and absolute control and supervision of the construction of said canal.

* * * * * *

'SEC. 3. The said commissioners shall receive proposals for the construction of said canal, agreeable to said plan, and, in deciding upon said proposals, are required to take into consideration the responsibility of the person or persons offering to contract for the same, and his or their ability to carry into effect the object and intention of said act of Congress, by constructing said canal in the best and most expeditious manner; and said commissioners, in making said contract, shall require good and ample security for the performance thereof.

* * * * * *

'SEC. 5. * * * The cost of locating the said canal, and all expenses of every kind incidental to the supervision of the construction and completion of said canal, shall be reimbursed by the contractors as fast as ascertained, and shall be paid by them into the State treasury and under the direction of said commissioners. When, and as fast as the lands shall have been selected and located, and accurate description thereof, certified by the persons appointed to select the same, shall be filed in the office of the commissioner of the State land office, whose duty it shall be to transmit to the Commissioner of the General Land

Office a true copy of said list and to designate and mark upon the books and plats in his office the said lands as Saint Mary canal lands.

'SEC. 6. The commissioners shall require said canal to be constructed and completed within two years from making the contract; and on the completion of the same within said period to their satisfaction and acceptance and the satisfaction of the governor and engineer, they shall have a certificate thereof to be signed by the commissioners, governor and engineer, and filed in the office of the commissioner of the State land office. Thereupon it shall be the duty of the said commissioner of the State land office forthwith to make certificates of purchase for so much of said lands as by the terms of the contract for the construction of said canal are to be conveyed for the purpose of defraying its costs and the expenses hereinbefore provided, which certificates shall run to such persons and for such portions of said lands so selected and to be conveyed as the contractor may designate, and shall forthwith be delivered to the Secretary of State, and patents shall immediately be issued thereon, as in other cases.

'SEC. 7. That said commissioners shall keep an accurate account of the sales and net proceeds of the lands granted by said act of Congress, and of all expenditures in the construction of said canal, and the earnings thereof, and on or before the first Monday in October in each year return a statement thereof to the governor, whose duty it shall be to return the same, or a copy thereof, to the Secretary of the Interior, at Washington, as required by said act of Congress.

* * * * * *

'SEC. 9. For the selection of the lands granted by Congress, as aforesaid, for the construction of said canal, the governor shall appoint agents, in pursuance of said act. He shall give notice to the person or persons contracting under this act to construct said canal, to recommend to him suitable persons to make such selections; and he shall appoint such agents from the persons so recommended, if, in his judgment, suitable and proper persons for that purpose.

* * * * * *

'Approved, February 5, 1853.'

Second.

"Your orator shows that the lands so appropriated were duly selected and certified to the State of Michigan, and that he is informed and verily believes, and so charges the fact to be, that the lands so appropriated were all sold and disposed of in some manner by the State of Michigan, and that at some time subsequent to such selection and certification said State of Michigan constructed, or caused to be constructed, and put into operation the canal and lock so appropriated for, but that the said State of Michigan did not report to the Secretary of the Interior, as required by the terms of section 5 of said act of Congress, an accurate account of the sales and net proceeds of the lands granted and of all expenditures in the construction, repairs and operating of said canal, and of the earnings thereof; but, on the contrary, your orator shows that after diligent search and inquiry in the office of the Secretary of the Interior, to whom such annual reports should have been made, no such reports can be found on file, and no record or memoranda indicating that any report or reports, such as were provided for in said section, were ever made, so that your orator

is unable to state in what manner said lands were sold or disposed of, or whether all the proceeds thereof were in fact devoted to the construction, control and management of said canal, as in said act provided.

Third.

"Your orator further shows that by an act of the legislature of the State of Michigan, approved February 12, 1855, a superintendent was authorized to be appointed by the governor of the State of Michigan, with the advice and consent of the senate thereof, his salary fixed, and the manner of keeping record of the vessels navigating said canal and passing through said lock, as well as the tolls to be collected and the keeping of accounts, were all provided for; that from the completion of said canal and lock the same were controlled, operated and managed by the State of Michigan, and that during the entire management of the same by said State, as your orator is informed and verily believes and therefore charges the fact to be, no funds belonging to the State of Michigan were ever permanently invested or involved in such control, operation and management, but, on the contrary, said canal was wholly constructed from the appropriation of such lands so made by the United States aforesaid, and was managed, controlled, repaired and maintained from the amounts collected as tolls from the vessels passing through said canal and lock during the several years when said State of Michigan was in such control thereof.

Fourth.

"And your orator further shows that he is informed and verily believes, and therefore charges the fact to be, that during such management and control by the State of Michigan there were from time to time moneys collected in the form of tolls in excess of the amounts actually used at the period of such collection, and that this was done without intention on the part of the State of Michigan to make a profit from the management and control of said canal in violation of the act of Congress hereinbefore quoted, but for the purpose of having cash on hand to make repairs either during the season when the canal was closed to navigation or any time when so needed, and that said fund gradually increased in amount with the increasing volume of commerce through the canal until finally, at the time when the canal was turned over to the United States, there was in the treasury of the State of Michigan belonging to the fund of said canal, not appropriated or the expenditure thereof in any way provided for, the acknowledged sum of $68,927.12, all of which had been paid for or collected in the manner hereinbefore stated for the purposes hereinbefore mentioned, and in direct compliance with the requirements of the act of Congress originally providing for the construction of said canal; and that said money had been collected in good faith and for the purposes of devoting the same ultimately to the repair, improvement, supervision and expenses of the management thereof.

"And your orator further shows that there was purchased and collected from time to time a large quantity of tools, implements and property of various kinds in connection with extensions, repairs, improvements, management and control of said canal and lock by defendant, and at the time of the transfer to the United States as aforesaid the same were on hand and within the control and in the custody of the defendant, all of which properly belonged and appertained to the said canal and lock and to the

defendant in its capacity as the manager and controller thereof, but whether any further and larger sum of money than is hereinbefore stated was, should or might have been on hand and within the control of said defendant, in its treasury or otherwise, or might or should have been accredited to the account of the said canal and lock, your orator does not know and has no means of being informed, and is therefore obliged to depend upon an accounting by the defendant, hereinafter to be prayed for, for correct and authentic information.

Fifth.

"And your orator further shows that the State of Michigan had no beneficial interest in said canal or lock, except as it affected the general public welfare, and had expended, or claimed to have expended, all the appropriation of Congress for the construction of the same, and that the increasing demands of commerce required great expenditures of money for the enlargement and betterment of said canal and lock, together with the probable construction of a new and enlarged lock, and that it was not convenient, if possible, to provide the funds therefor by the collection of tolls upon the vessels passing and repassing through said canal; that the State of Michigan not alone being interested in such enlargement and improvement, but rather the general public, and particularly the inhabitants of several rapidly growing States of the Union, it was proposed to transfer the canal to the United States to accomplish such end, and for that purpose an act was passed by the legislature of the State of Michigan and became operative on March 3, 1881."

(This act, although not set forth in the bill, is given in the margin.)*

"By the terms of said act the board of control of said canal, constituted by defendant for its management, was authorized and empowered, at any time when they might deem it proper, to transfer all material belonging

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*Act No. 17, Public Acts 1881.

An act to authorize the board of control to transfer the Saint Marys Falls Ship Canal, with the property belonging to the same, to the United States.

Whereas, Congress at its last session included in the river and harbor bill the following:

For improving and operating the Saint Marys River and Saint Marys Falls Canal, two hundred and fifty thousand dollars. "And the Secretary of War is hereby authorized to accept on behalf of the United States from the State of Michigan the Saint Marys Canal and the public works thereon: *Provided*, Such transfer shall be so made as to leave the United States free from any and all debts, claims or liability of any character whatsoever, and said canal after such transfer shall be free for public use: *And provided further*, That after such transfer the Secretary of War be and hereby is authorized to draw from time to time his warrant on the Secretary of the Treasury to pay the actual expense of operating and keeping said canal in repair." Therefore,

SEC. 1. *The People of the State of Michigan enact*, That the board of control of the Saint Marys Falls Ship Canal be and hereby is authorized and directed to transfer the said canal and the public works thereon, with all its appurtenances and all the right and title of the State of Michigan in and to the same, to the United States

to said canal and to pay over to the United States all moneys remaining in the canal fund, excepting so much as might be necessary to put the canal in repair for its acceptance in accordance with the act transferring the same to the United States; and the Congress of the United States in turn passed an act authorizing the Secretary of War to accept on behalf of the United States from the State of Michigan the said canal and the public works thereon, and appropriating $250,000 to improve and operate the same, the same being the act approved June 14, 1880, found in 21 Stat. 189." (This act is correctly set forth in the preamble to the foregoing act of the State of Michigan.)

"And thereupon said canal actually was transferred to the officers of the Government of the United States connected with the War Department thereof, and your orator shows, avers and charges that no tools, implements, personal property, chattels, goods, moneys or effects of any name or nature that were in the treasury of the State of Michigan, or should or might have been therein at the time of such transfer, or within the custody of said State of Michigan, defendant herein, or might have been in such custody connected with or belonging to said canal or lock, its funds its management and control, were so transferred and turned over.

Sixth.

"Your orator further shows that, while certain of the terms of the act of Congress appropriating the land for the construction of said lock and canal indicated a donation to the State of Michigan for such purpose, it was really the intent and purpose of the Congress of the United States to appropriate such lands, not for the purposes of exclusively enriching the State of Michigan, increasing its commerce or extending its authority alone, but for the purpose of accomplishing a public work for the general

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in accordance with (the) provisions of the above mentioned clause: *Provided*, That this cession is upon the express condition that the State of Michigan shall so far retain concurrent jurisdiction with the United States over the Saint Marys Falls Ship Canal, and in and over all lands acquired or hereafter acquired for its use; that any civil or criminal process issued by any court of competent jurisdiction, or officers having authority of law to issue such process, and all orders made by such court, or any judicial officer duly empowered to make such orders, and necessary to be served upon any such person, may be executed upon said Saint Marys Falls Ship Canal, its lands, and in the buildings that may be erected thereon, in the same way and manner as if jurisdiction had not been ceded as aforesaid.

SEC. 2. The board of control of the Saint Marys Falls Ship Canal are hereby authorized and empowered, at any time when they may deem it proper, to transfer all material belonging to said canal, and to pay over to the United States all moneys remaining in the canal fund, excepting so much as may be necessary to put the said canal in repair for its acceptance in accordance with the act above recited: *Provided*, Such transfer of material and payment of moneys shall be in consideration of the construction, by the United States, of a suitable dry dock, to be operated in connection with the Saint Marys Falls Ship Canal for the use of disabled vessels.

This act is ordered to take immediate effect.

Approved March 3, 1881.

good of all classes of people engaged or interested in the commerce of the Great Lakes of the United States, and for that reason, while granting said lands to the State of Michigan in certain of its terms, it was provided that in case of the failure to construct said canal the proceeds of the sale of such lands should be returned to the United States; also that the State of Michigan should have no beneficial interest in the revenue from said canal, when constructed, while in its management and control, but that the said canal and lock should be actually free to the United States Government, and for the use of all persons desiring the same, except as to the necessary tolls to pay for their supervision, repairs and maintenance; and it was also provided that a strict account should be kept of the sales of said lands, and that they should be applied to the construction of said canal and lock and to no other purpose whatever; also that annual reports should be made by the State of Michigan and forwarded by the governor thereof to the Secretary of the Interior concerning the management, control and sale of lands; and thus, instead of being an actual grant or donation of lands to the State of Michigan for its individual benefit, and to become a part of its domain and to be within its ownership, the terms of said act merely operated to create a trust in the State of Michigan for the purpose of carrying out a public work in which it, the State of Michigan, had become interested for the general public good. Your orator further shows that by the act of the legislature of the State of Michigan hereinbefore quoted said donation or appropriation of lands was accepted subject to all limitations, restrictions and conditions imposed by Congress as aforesaid. Your orator further shows that the State of Michigan, at the time and continuously until a very recent period, hereinafter to be mentioned and set forth, not only regarded its sale of said lands, its construction of said works and its management and control of the latter as a trust for the public good from the complainant, but also through its legislature, as well as various of its officers, so declared; and that in an act of the legislature of the State of Michigan passed and approved February 14, 1859, the same being No. 175 of the session laws of the State of Michigan for said year, and particularly in the third paragraph of the preamble thereof, said legislature made use of the following language:

> 'Whereas such canal, having been built and accepted by the authorities of this State, is found to need repairs in order to its preservation and usefulness, and the due performance of the trust created by said act of Congress, and the assent of this State thereto,' &c.

"And your orator further shows that the treasurer of the State of Michigan, who, by virtue of his office, was one of the members of the said board of control of the Saint Marys Falls Ship Canal, in his annual report for the year 1883, duly made to the governor and transmitted to the legislature of said State, made use of the following language:

> 'Since my last report, the remainder of the personal property belonging to the Saint Marys Falls Ship Canal has been sold, making a final balance in that fund of $68,927.12. All business pertaining to the management of the canal on the part of the State has ceased and the moneys in the fund remain in the State treasury under act No. 17, laws 1881, the State acting simply as trustee.'

"But your orator shows that of late said defendant, through its officers and servants, and particularly its attorney general and the board of control of St. Marys Falls Ship Canal, denies such a trust, or its liability to the United States in the premises.

Seventh.

"Your orator further shows and charges that it became and was the duty of the State of Michigan to transfer and pay over to the United States all funds appertaining to or connected with or collected for the repairs and management of said canal to the complainant, and to transfer to the complainant all property of every name and nature within its custody and control in connection with said canal and lock, and that instead of so performing its equitable duty in the premises, the said State of Michigan, the defendant herein, converted said funds to its own use, by passing a joint resolution transferring the same from the canal fund to the general fund in the treasury of said State, said joint resolution being No. 20, of the public acts of 1897, which in terms is as follows;

'Whereas there has remained to the credit of the St. Marys Ship Canal fund a credit balance which was on hand at the time of the transfer of the said canal from the State to the United States, and no claim has been made for any part of such moneys, either by any person who paid the same into the fund or by the General Government;

'And whereas there now remains on hand, under the board of control of the St. Marys Ship Canal, an invoice of tools and machinery, and no demand by any person or persons or by the United States having been made for a transfer of said tools and machinery:

'*Therefore, resolved by the Senate and House of Representatives of the State of Michigan*, That the auditor general be, and he is hereby, directed to transfer such balance as shown upon the books of his office to the same, and it shall hereafter become a part of the general fund of the State.

'*And be it further resolved*, That the board of control of the St. Marys Ship Canal be, and they are hereby, authorized to dispose of, at the best possible advantage, the tools and machinery aforesaid and now under their control, and deposit the money received from the sale of said property in the general fund of this State.'

"Your orator further shows that a due and proper request to account to the United States in the premises, and to pay over all funds and turn over all property in its hands to the United States, has been made by your orator of the governor of the State of Michigan and all of the officers of said State directly concerned in any manner with the custody, management or control of said fund or property, and particularly of the board of control of the St. Marys Ship Canal, which consists of the governor, auditor general and treasurer of the said State of Michigan; and also of the attorney general of the State of Michigan, and that said reasonable and just request has been refused by them and each of them."

The bill prayed for an accounting as to the sales of the lands, the prices obtained therefor, the application of the proceeds of the sales or exchange of such lands to the cost of the construction of the canal, the tolls received,

their application, and also an accounting as to the tools on hand at the time of the transfer of the canal to the United States.

Mr. Justice PECKHAM, after making the foregoing statement of facts, delivered the opinion of the Court.

By its bill the United States invokes the original jurisdiction of this court for the purpose of determining a controversy existing between it and the State of Michigan. This court has jurisdiction of such a controversy, although it is not literally between two States, the United States being a party on the one side and a State on the other. This was decided in *United States* v. *Texas*, (143 U. S. 621, 642.)

In the consideration of this case, the controlling thought must of course be to arrive at the meaning of the parties, as expressed in the various statutes set forth in the bill. While that meaning is to be sought from the language used, yet its construction need not be of a narrow or technical nature, but in view of the character of the subject, the language should have its ordinary and usual meaning.

Whether, under these circumstances, technical words were used to express the thought that the State was to be a trustee, is not important if, upon a reading of the statutes and a survey of the condition of the country when the acts were passed, it is apparent that the intent was that the State should occupy the position of trustee in the construction and operation of the canal. (*Winona &c. R. R. Co.* vs. *Barney*, 113 U. S. 618, 625.)

The general purpose of these statutes was to build a ship canal, by means of the funds procured from the sale or other disposition of the public lands of the United States, to be used by all those whose business or pleasure should call them to pass through it in order to reach their destination.

As is well known, the Saint Marys River connects the waters of the lakes, Huron and Superior. The navigation of the river is interrupted by Saint Marys Falls, and it early became necessary, in order to provide conveniences for a rapidly increasing commerce, that there should be built a ship canal around these falls, so that large vessels coming from or going to Lake Superior should be thereby enabled to pursue their voyage to the east or to the west without interruption by those falls. The State of Michigan did not feel at that time (1850–1852) able to undertake such work itself, although it was a matter of much importance to many of her citizens. Finally the United States passed the act of 1852, set out in full in the foregoing statement. The State subsequently accepted the same with all the conditions contained therein. We think it sufficiently appears from a perusal of these two acts that it was assumed that the grant of the right of way through the lands of the United States and the grant of the 750,000

acres of its public lands in the State of Michigan would pay the cost of construction of the canal, and the tolls to be collected by the State would repay it for all advances made by it in the repairs which would naturally and from time to time be required in such a work. There was no reason why the United States should provide that the State of Michigan should actually receive a profit over and above the payment to it of all its expenses for the construction of the canal and for keeping it in repair. If, through the action of the United States, a public work of national importance were constructed within the boundaries of that State, and the State itself reimbursed for every item expended by it in the construction and in the keeping of such work in repair, it would certainly seem as if the State could properly ask no more. It was clearly not the intention that the State should realize a beneficial interest from the transaction between the United States and the State over and beyond that which would arise from the existence of this canal. The cost of its construction and the keeping of it in repair were not to be borne by the State, even to the extent of a single dollar. That the parties supposed the cost would be borne by the United States is proved by an examination of the statutes, and if it be a fact, it goes far to show that the State was in this matter acting in effect and substance as an agent, or, in other words, as a trustee for the United States, and that the transaction was not to be a source of profit to the State, by reason of getting more from the United States than it would cost to build the canal.

The expectation that the means provided by the United States for the construction of the work would be adequate for that purpose, was not a visionary one, and it is proved by the fact, alleged in the bill and admitted by the demurrer, that such means were in truth adequate, and the canal was wholly constructed from the appropriation of the lands granted by the United States, and managed, repaired and maintained from the tolls exacted by the State from vessels passing through the canal.

An examination of the act of Congress of 1852, set forth in the foregoing statement of facts, will show, as we think, the trust character of the transaction between the United States and the State. There is granted to the State, by section one, the right of locating a canal through the public lands of the United States four hundred feet in width, but this right of way is by the terms of the act to be used by the State or under its authority for the construction or convenience of such canal and the appurtenances thereto, and the use thereof is thereby vested in the State forever, but "for the purposes aforesaid and no other." The canal must be at least one hundred feet wide, with a depth of water of twelve feet, and with locks at least two hundred and fifty feet long and sixty feet wide. The act does not grant an absolute estate in fee simple in the land covered by this right of way. It was in effect a grant upon condition for a special purpose; that is, in trust for use

for the purposes of a canal, and for no other. The State had no power to alien it and none to put it to any other use or purpose. Such a grant creates a trust at least by implication. We have just held in *Northern Pacific Company* v. *Townsend*, (189 U. S. ,) in reference to a grant of a right of way for the railroad, that it was "in effect a grant of a limited fee, made on an implied condition of reverter, in the event that the company ceased to use or retain the land for the purpose for which it was granted."

The second section granted to the State, "for the purpose of aiding said State in constructing and completing said canal, 750,000 acres of public lands," belonging to the United States and lying within the State, which were to be subject to the disposal of the legislature of the State for such purpose and no other, and the canal was to be and remain a public highway for the use of the Government of the United States, free from toll or other charge upon the vessels of said Government engaged in public service, or upon vessels employed by said Government in the transportation of any property or troops of the United States. It was also provided that if the canal should not be commenced within three years and completed within ten years, the State was bound to pay to the United States the amount it received upon the sale of any part of said lands by the State at not less than $1.25 per acre, although the title to the purchasers from the State should remain valid. The State was bound to cause to be kept accurate accounts of the sales and net proceeds of the lands granted and of all expenditures in the construction, repair and operating of the canal and of the earnings thereof, and was to render a statement of the same annually to the Secretary of the Interior, and whenever the State should be fully reimbursed for all advances made for the construction, repairs and operating the canal, with legal interest on all advances until the reimbursement of the same, or upon payment by the United States of any balance of such advances from the receipts from the lands and canal with such interest, the State was then only to be allowed to tax for the use of the canal such tolls as should be sufficient to pay all necessary expenses for its care, charge and repairs of the same, and before the State could dispose of any of the lands, the route of the canal was to be established and a plat thereof filed in the office of the War Deparment, and a duplicate thereof in the office of the Commissioner of the General Land Office. The sixth paragraph of the bill calls special attention to these facts.

In this Federal statute we find the purpose of the United States in granting the land. It was not for the benefit of the State of Michigan, and the State did not thereby receive any beneficial interests in such lands. As soon as it was repaid its outlay for the cost of the construction and for the maintenance and repairs of the canal, the tolls were to be reduced to such a sum as should be sufficient only to pay the necessary expenses for the

care, charge and repair of the same. Evidently it was not supposed that the State was to profit from this grant further than such profit as might arise indirectly from the completion and operation of the canal.

Defendant refers to certain grants of land made to Illinois, Indiana and Ohio, and perhaps to some of the other States, where such grants were made to aid in the construction of canals in those States, and where possible profits from the construction of such canals were within the contemplation of the various grants. But in the acts referred to there are no restrictions upon the tolls which the States may charge for the use of their respective canals, the only limitation imposed being that the Government should have their free use for the passing of its vessels, while in this act the tolls which the State may charge are to be only such, after the payment for its construction, &c., as should be sufficient to pay the necessary expenses for the care, charge and repairs thereof.

The State of Michigan, through an act of its legislature, duly accepted the terms of the act of Congress, and agreed to carry out all the conditions therein made obligatory upon that State. An attentive reading of that statute shows its purpose to conform to all of the provisions of the Federal statute. It provides (section 7) for keeping accurate books of account of sales and net proceeds of the lands and for making returns to the Secretary of the Interior containing such accounts; provides (section 5) for designating the lands granted as "Saint Marys Canal Lands;" and also (section 3) provides that in letting contracts for construction of the canal, the responsibility of the proposed contractor and his ability to carry into effect the object of the act of Congress are to be considered. Reading both statutes, it seems to us the effect was to create a trust, and that the State was made the trustee to carry out the purposes of the act of Congress in the construction and maintenance of the canal. If there were funds arising from the sale of the lands over and above the cost of construction and other expenses of the canal, it could not within reason (after a perusal of these two statutes, with the provisions for accounting for sales and net proceeds of lands, and the other provisions of the statutes already mentioned) be supposed the parties understood that Michigan was to have for its own treasury the balance arising beyond such cost, maintenance, &c., of the canal. If a surplus arose in the course of the operation of the canal the tolls were to be at once reduced, and it seems to us that that surplus would upon a fair and reasonable construction of the acts belong to the original owner of the lands, by means of which the State, as in substance the agent of the United States, was enabled to construct the canal and secure the tolls arising from its operation, to be expended upon its maintenance and for necessary repairs. This would certainly be so after the formal transfer of the canal and after the surplus was conclusively ascertained, and was subject to no further claims for repairs of the canal on the part of the State. The

tolls were in fact the proceeds of the trust fund (the lands) which belonged to the United States, and should be transferred with the rest of the trust property.

Where Congress grants land to a State to be used as provided in this statute, we think a trust or power to dispose of the lands for the purpose of carrying out the improvement is granted, and in this case no beneficial interest passes to the State by the language used, considering the whole statute. (*Rice* v. *Railroad Company*, 1 Black, 358, 378.)

If any particular part of the statute in this case were ambiguous or its meaning doubtful, of course the intention must be deduced from the whole statute and every part of it. Hence the importance of those provisions which in effect, if carried out, prevent the State from making any direct profit by the construction of the canal or from the tolls received from vessels passing through it. And where words are ambiguous, legislative grants must be interpreted most strongly against the grantee and for the Government, and are not to be extended by implication in favor of the grantee beyond the natural and obvious meaning of the words employed. Any ambiguity must operate against the grantee and in favor of the public. (*Rice* v. *Railroad Company, supra*, p. 380.) This rule of construction obtains in grants from the United States to States or corporations in aid of the construction of public works. (Id. 10.)

Then, too, there is the almost contemporaneous construction placed upon the Federal statute by the legislature of Michigan in the act No. 175, approved February 14, 1859, in the preamble of which it is said that "whereas such canal having been built and accepted by the authorities of this State is found to need repairs in order to its preservation and use to the due performance of the trust created by said act of Congress and the assent of this State thereto," &c. Again, the treasurer of the State, who by virtue of his office was one of the members of the board of control of the Saint Marys Falls Ship Canal, in the course of his annual report for the year 1883, made to the governor and transmitted to the legislature of the State, used the following language:

"Since my last report, the remainder of the personal property belonging to the Saint Marys Falls Ship Canal has been sold, making a final balance in that fund of $68,927.12. All business pertaining to the management of the canal on the part of the State has ceased and the moneys in the fund remain in the State treasury under act No. 17, laws of 1881, the State acting simply as trustee."

We do not, of course, assume that the State treasurer could bind the State of Michigan by any admission he might make in a report to the legislature of that State, but it shows simply the understanding of that official, who was so closely connected with the construction and operation of the canal, in relation to the surplus funds in the treasury of the State arising

out of the operation of the canal. That the State legislature in 1859 regarded the State as a trustee, is evident from the above language in the portion of the preamble quoted.

Finally, by the joint resolution of the legislature, being No. 20 of the Public Acts of 1897, it was stated as follows:

"Whereas there has remained to the credit of the Saint Marys Ship Canal fund a credit balance which was on hand at the time of the transfer of the said canal from the State to the United States, and no claim has been made for any part of such moneys, either by any persons who paid the same into the fund or by the General Government;

"And whereas there now remains on hand, under the board of control of the Saint Marys Ship Canal, an invoice of tools and machinery, and no demand by any person or persons or by the United States having been made for a transfer of said tools and machinery:

"*Therefore, resolved by the Senate and House of Representatives of the State of Michigan*, That the auditor general be, and he is hereby, directed to transfer such balance as shown upon the books of his office to the same, and it shall hereafter become a part of the general fund of the State.

"*And be it further resolved*, That the board of control of the Saint Marys Ship Canal be, and they are hereby, authorized to dispose of, at the best possible advantage, the tools and machinery aforesaid and now under their control, and deposit the money received from the sale of said property in the general fund of this State."

From these statutes and resolutions we think it quite clearly appears that the State and its public officers thought that a trust had been created, and that the State had received the lands in trust for the purpose of carrying out the provisions of the Federal statute. A surplus arising from the sales of lands and from the tolls, over and above all cost of construction, repairs, &c., after the formal transfer of the canal itself, belongs to the United States, and it is the proper party to recover the same.

The counsel for defendant, however, urged that other action by the United States shows that no such trust existed. He referred to the joint resolution of the State adopted in 1869, wherein the necessity for the immediate enlargement of the Saint Marys Falls Canal, a work of urgent necessity and national importance, was advocated, and it was therein said that the State of Michigan had no funds properly applicable to such purpose, and it was, therefore, resolved that the board of control of the canal should be authorized and directed to transfer the canal, with all its appurtenances and all the right and title of the State of Michigan in and to the same, to the United States, provided the State should be first guaranteed and secured to the satisfaction of the board against loss, by reason of its liability, on certain bonds which had been issued by it under authority of an act to provide for the repairs upon the canal, "and to perform the trust respecting the same," approved February 14, 1859. Even in this act of 1859, the legislature, as has already been stated, acknowledges the

trust and passes an act for the purpose of performing its obligations respecting the same. But it is said that this resolution (of 1869) providing for the transfer of the canal was not noticed or accepted by the United States until 1880, when Congress, by an act approved June 14, 1880, authorized the Secretary of War to accept on behalf of the United States from the State of Michigan the canal, provided "such transfer should be made so as to leave the United States free from any and all debts, claims and liability of any character whatever. Said canal after such transfer to be free for public use."

This offer under the act of 1880 was accepted by the State by act No. 17, Public Acts of Michigan of 1881, *supra*, and the board of control was authorized and directed: First. "To transfer the said canal and the public works thereon, with all its appurtenances, and all the right and title of the State of Michigan in and to the same, to the United States," in accordance with the provisions of the act of Congress approved June 14, 1880; and, second, "At any time when they may deem it proper, *to transfer all material belonging to said canal, and to pay over to the United States all moneys remaining in the canal fund*, excepting so much as may be necessary to put the said canal in repair, for its acceptance in accordance with the act above recited: *Provided, Such transfer of material and payment of moneys* shall be in consideration of the construction, by the United States, of a suitable dry dock, to be operated in connection with the Saint Marys Falls Ship Canal for the use of disabled vessels."

It is argued from this legislation that Congress thereby recognized and acknowledged the ownership of the canal by the State free from any trust connected therewith, and that the provision by the State for transferring all material belonging to the canal and for paying over to the United States all moneys remaining in the canal fund, &c., were upon the condition just quoted, and it is stated that there was no proof that such dry dock had been constructed, and hence there was no liability on the part of the State to pay the moneys or deliver the tools. But if the original transaction amounted to a trust, as we think it did, the attempt of the State to impose a condition upon its payment of the moneys and the transfer of the tools did not take away its liability as trustee nor make it necessary that the United States should build the dry dock before it should be entitled to the money and the tools. The United States might have been satisfied to permit the State to retain its nominal title and to remain in possession, and to operate the canal under its original obligations, and when in 1880 it authorized the Secretary of War to accept the canal from the State without any liability on its part for debts or claims in regard to the canal, it did not thereby in any manner admit the non-existence of any trust theretofore created. Assuming that the land grant and the tolls had been sufficient to construct the canal and operate and repair it, there was

no reason why the United States should assume or agree to pay any debts or claims which might exist in regard to the canal. The consideration for the transfer of the material and the payment of the moneys amounted at most to a provision in the nature somewhat of a condition subsequent, and the right to such transfer and payment did not rest upon the prior building of the dry dock by the United States. There was nothing in this legislation, in our opinion, which changed the character in which the State had acted as trustee up to the time of such transfer of the canal, and the liability of the State was not altered by reason of the act of 1880 or that of 1881.

We are of opinion that the bill shows a cause of action against the State of Michigan as trustee, and its liability to pay over the surplus moneys, (if any,) which upon an accounting it may appear have arisen from the sale of the granted lands, over and above all cost of the construction of the canal and the necessary work appertaining thereto, and the supervision thereof, together with the surplus money arising from the tolls collected, which latter sum by the demurrer is admitted to amount to $68,927.12. This sum the United States in substance (especially in the fourth paragraph of the bill) admits is all that is due from the State on account of such tolls. It is not entitled to go back of that amount and call for an accounting as to the tolls prior to the transfer of the canal to the United States. The latter is also entitled to recover the value of the tools, &c., mentioned in the bill, as of the time of the transfer of the canal.

We think there is no ground of defense arising from any alleged laches on the part of the United States in bringing this suit. Assuming the existence of what would be laches in a private person, the defense that might arise therefrom is not available ordinarily against the government. (*United States* v. *Beebe*, 180 U. S. 343, 353.)

There must be judgment overruling the demurrer, but as the defendant may desire to set up facts which it might claim would be a defense to the complainant's bill, we grant leave to the defendant to answer up to the first day of the next term of this court. In case it refuses to plead further, the judgment will be in favor of the United States for an accounting and for the payment of the sum found due thereon.

Demurrer overruled and leave to answer given, &c.

True copy.

Test:

Clerk Supreme Court, U. S.